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DEBI PRASAD SHARMA *v.* EMPEROR, (1943) 2 M.L.J. 568 (P.C.).

From the point of view of the liberty of the press, the decision of the Judicial Committee in the above case constitutes a notable pronouncement. The matter came before the Board on appeal from the judgment in *Emperor* v. *Debi Prasad Sharma*[1], where the printer, publisher and editor of a daily newspaper were charged in contempt proceedings by the Allahabad High Court, for having published a news item and comment thereon untruly alleging that the Chief Justice had written to the subordinate judicial officers enjoining them to collect money for the War Fund, and were found guilty and convicted for the same. The learned Judges who heard the rule held that the publication " is a clear contempt of Court and it is unnecessary to quote authority." In reversing the decision of the High Court, the Privy Council points out that on the facts found " there is no criticism of any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice." It was further observed : " It can hardly be said that there is any criticism of him in his administrative capacity, for. . . . the administrative control of the subordinate Courts of the province. . . . is exercised not by the Chief Justice but by the Court over which he presides." In effect the criticism was of something alleged to have been done by the Chief Justice outside his judicial proceedings. In the circumstances, according to the Privy Council " a simple denial in public of the alleged request would at once have allayed the trouble"; and " if a Judge is defamed in such a way as not to affect the administration of justice he has the ordinary remedies for defamation if he should feel impelled to use them." Their Lordships therefore held that " the proceedings in contempt were misconceived." Incidentally their Lordships point out that though it will be galling for any judicial personage to be criticised publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet, "judicial personages can afford not to be too sensitive." In view of these remarks it may be useful to examine the law as established in regard to this matter.

Jurisdiction in contempt is special and extraordinary. Every court of record has such jurisdiction. The Court deals with it *brevi manu.* Contempt of Court may be of three types, according to Lord Hardwicke. They are : (1) contempt by scandalising the Court itself; (2) contempt of Court in abusing parties who are concerned in causes there ; and (3) contempt of the Court in prejudicing mankind against persons before the cause is heard, In re *Read and Huggenson*[2]. In *Reg.* v. *Gray*[3], Lord Russell of Killowen, L.C.J., has stated that contempt by scandalising a Court or a Judge occurs when any act is done or writing is published to bring a

1. (1942) O.W.N. 6 : 1942 All.Cr.C. 28. 2. (1742) 2 Atk. 469 : 26 E.R. 683.
3. (1900) 2 Q.B. 36.

Court or a Judge of the Court into contempt or to lower his authority. In *In the Reference from the Bahama Islands*[1], the test applied was whether the words complained of were calculated to obstruct or interfere with the due administration of the law or the course of justice. So anything said or written about a Judge not as a Court but as an individual, not concerning the administration of law but outside it, not interfering with the course of justice but merely criticising him in regard to alleged acts outside his judicial duties may not constitute contempt by way of scandalising the Court.

The basis of the power to punish for contempt and the limitation subject to which the power should be exercised are indicated by Lord Morris in delivering the judgment of the Judicial Committee in *McLeod* v. *St. Aubyn*[2], where he observed : " The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. *It is not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal information* (italics ours). Committal for contempt of Court is a weapon to be used sparingly and always with reference to the administration of justice." The antithesis is thus between vindication of the judge as a person and vindication of the judge with reference to the administration of justice. The point is carried further by Lord Russell of Killowen L.C.J., in *Reg.* v. *Gray*[3], where he remarked: "Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good no Court could or would treat that as contempt of Court." In *Ambard* v. *Attorney-General for Trinidad and Tobago*[4], in memorable words, Lord Atkin laid down : " But whether the authority and position of an individual judge, or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The observations of Lord Russell of Killowen, L.C.J., and Lord Atkin show that even where criticisms are made of the " public act done in the seat of justice," the critic is immune provided the criticism is " genuine," in "good faith" and does not attribute "improper motives" to the judicial personage criticised. In other words there should be an absence of " malice " about the criticism. In the instant decision, according to the Privy Council, the criticism was not only not about the Court or the administration of justice but the learned Judges of the High Court had found that the accused were not animated by malice.

Incidentally another matter might be adverted to. In *McLeod* v. *St. Aubyn*[2], it was stated that even in regard to contempt by way of scandalising the Court, contempt proceedings had become obsolete in England, a reservation being however made as regards " small colonies with coloured populations." Lord Morris stated : " Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies consisting principally of coloured populations the enforcement in proper cases of committals for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court." It may respectfully be urged that a more appropriate test will be the "local conditions" instead of the colour of the people. Anyway, that contempt proceedings have not become obsolete even in England is clear from *Reg.* v. *Gray*[3], as observed by Lord Atkin in the case under review.

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1. (1893) A.C. 138.
2. (1899) A.C. 549 (P.C.).
3. (1900) 2 Q.B. 36.
4. (1936) A.C. 322.

ANANT *v.* SHANKAR, (1943) 2 M.L.J. 599 (P.C.).

This is a decision of considerable importance, in the law of adoption. It elucidates the scope of the ruling in *Amarendra Man Singh* v. *Sanatan Singh*[1]. That case had given a re-orientation as regards the limits of a widow's power of adoption. The power will cease only if her husband had left a son and that son himself had died leaving behind him his own widow or son to continue the line. The power had nothing to do with the question of vesting or divesting of the estate, *Vijaysinghji Chatrasinghji* v. *Shivsangji*[2]. The decision under notice has re-affirmed and applied these principles.

The ruling is however to be noted for more than one point. It lays down that if an adoption is valid it cannot be refused effect. It repudiates the theory that though an adoption as such may be valid it cannot divest any estate of inheritance unless the estate was then vested in the adopting widow as heir either to her husband or a deceased son—a theory, which had been upheld by a Full Bench of the Bombay High Court in *Balu Sakharam* v. *Lahoo*[3]. It rejects the proposition that the existence of a coparcenary at the date of the adoption into which the adopted son could be admitted is essential if he is to share in the family property. The view of Beaumont, C.J., in *Balu Sakharam's case* with which Wadia, J., had agreed that the rulings in *Amarendra's case* and *Vijaysinghji's case*, were to be explained on the footing that in those cases a coparcenary was subsisting is stated to be unacceptable as according to their Lordships those two were really cases where property had passed to a collateral by *inheritance* from the last male-holder. Incidentally their Lordships seem to reject the view of Rangnekar, J., on p. 572 of *Balu Sakharam's case*[3], that the widow's power to adopt can be defeated by a partition between coparceners, a view which according to their Lordships "has since been negatived by two High Courts on very cogent reasoning, *Bajirao* v. *Ramakrishna*[4], *Sankaralingam Pillai* v. *Veluchami Pillai*[5]."

One point in the decision under notice is bound to arrest attention. The Privy Council holds that on adoption by the mother of the last male-holder it is not merely the property taken by him from his own father but also the properties which he had inherited from other persons, which all on his death had vested in a collateral as heir to him, that would be divested. It has no doubt been considered to be settled law—see *Pattu Achi* v. *Rajgopal Pillai*[6]—that an adoption by a widow after the death of her son would divest her of the property she had taken as his heir. The statement may be held to cover a case where the son had inherited the property from one other than his father. The anomalous results which the rule may entail have been referred to in (1941) 2 M.L.J. 25 (N.I.C.). The present decision constitutes a confirmation of that interpretation. It also goes a step further and extends the rule to a case where the property of the last male-holder had passed to a person other than the mother of the deceased. The scope of *Bhoobun Moyee's case*[7], as understood in *Faisuddin Khan* v. *Tincowri Saka*[8], that no adopted son could claim as preferential heir the estate of any person other than his adoptive father if such estate had vested before adoption in some heir other than the adoptive widow and the view of Telang, J., in *Chandra* v. *Gojarbai*[9] that adoption by a widow does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband are held to be untenable after the decision in *Amarendra's case.* At the same time it is stated that "neither the present case nor *Amarendra's case* brings into question the rule of law considered in *Bhubaneswari Debi* v. *Nilkomal*[10], that "according to the law. . . . an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral." Thus in the result it would seem (1) that the adopted son can always divest the interest of his

1. (1935) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
2. (1936) 68 M.L.J. 701 : L.R. 62 I.A. 161 : I.L.R. 59 Bom. 360 (P.C.).
3. I.L.R. (1937) Bom. 508 (F.B.),
4. I.L.R. (1941) Nag. 707.
5. (1942) 2 M.L.J. 678 (F.B.).
6. (1941) 2 M.L.J. 134.
7. (1862) 10 M.I.A. 279 (P.C.).
8. (1895) I.L.R. 22 Cal. 565, 571.
9. (1890) I.L.R. 14 Bom. 463, 469.
10. (1885) L.R. 12 I.A. 137, 141 : I.L.R. 12 Cal. 18 (P.C.).

father which had on his death vested in any person either by survivorship or by inheritance; (2) that if the adoption is made after the death of a collateral of the husband the adopted son cannot claim the properties of the collateral as his preferential heir from the person to whom it had passed by heirship; but (3) where the adoption is made by the mother of the last male holder after his death the adopted son can divest from the person in whom it had vested, be it the adoptive mother or a third person, not merely the property which had come to the last male-holder from his own father but also property which had come to him from other persons or sources.

DACCA MUNICIPALITY *v.* KRISHNA LAL PAL, I.L.R. (1943) 1 Cal. 1.

An interesting question concerning encroachments on municipal roads and the liability of the municipality to pay compensation, where the encroachment directed to be removed had been enjoyed for over the period of prescription *after* the constitution of the municipality, fell to be considered in this case. Section 241 (1) of the Bengal Municipal Act corresponds roughly to sections 180, 181 and 182 (1) of the Madras District Municipalities Act; likewise section 241 (3) corresponds to section 182 (2). Under the Bengal Act, provision is made for the payment of compensation "if any structure or fixture was constructed over a land *before* it became a public street and the right to have such a fixture had been acquired by prescription." The Act does not provide for payment of compensation to an owner who by prescription *after* the constitution of the municipality has acquired a title to the fixture. In the Madras Act no distinction is made between a construction prior to the constitution of the municipality and one subsequent thereto. If a title by prescription has been acquired, then on eviction the owner will be entitled to compensation, if he suffers damage thereby, *Rathnaswami Nadar* v. *Virudunagar Municipal Council*[1]. In the case under review the learned Judges remark: "If any structure or fixture was constructed over a land before it became a public street . . . obviously the erection of the structure or fixture was not a public nuisance at the time when it was erected and consequently the owner or occupier is entitled to get damages. If the structure or fixture was erected over the land after it became a part of the public street it would become a public nuisance and by prescription such nuisance cannot be legalised." If this be the *raison d'etre* underlying the award of compensation then the provision in the Madras Act drawing no distinction between prescriptive title acquired before the constitution of the municipality and one acquired subsequent thereto in the case of encroachments seems to ignore it. The true principle however seems to be, not whether the encroachment in question was a public nuisance or not but, whether open and adverse enjoyment for a certain number of years where it did not originate in an offence should be denied effect.

BAIKUNTANATH HALDAR *v.* KISHORI MOHAN BANERJI, I.L.R. (1943) 1 Cal. 5.

The effect of a vesting order under section 37 of the Provincial Insolvency Act has been the subject of several decisions and of conflicting judicial opinions. According to one view, as annulment puts an end to the insolvency proceedings, the appointee under section 37 is a mere custodian of the properties of the ex-insolvent; the creditors are left to their ordinary remedies and the appointee is to hold the properties subject to any order of attachment and sale he might receive from any Court; he may take steps to preserve the assets but he has no right to admit proof of debts, distribute dividends, or do any act of administration of a nature which a receiver in insolvency can do. The leading expositors of this view are the rulings in In re *Anamale Chettyar* v. *R. K. Banerji*[2], following *Jaing Bir Singh* v. *The Official Receiver*[3] and *Panna Lal* v. *Official Receiver*[4]. The other view is that the appointee

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1. (1943) 1 M.L.J. 406.
2. (1936) I.L.R. 14 Rang. 254 (F.B.).
3. (1933) I.L.R. 11 Rang. 287 (F.B.).
4. (1930) I.L.R. 53 All. 313.

under section 37 can under the directions of the Court realise the assets of the debtor and distribute them among the creditors much in the same way as is provided in the Insolvency Act. The leading authority expounding this view is *Veerayya* v. *Srinivasa Rao*[1] followed in decisions of the Patna, Calcutta and Lahore High Courts. All the decisions are agreed : (1) Section 43 is introduced for the first time by the Insolvency Act of 1920 ; (2) It has no analogue in the English Bankruptcy law ; (3) Its object is the punishment of the insolvent and not the conferment of any advantage on him ; and (4) Where the Act provides that the property of an insolvent shall vest in the Court or in a receiver it also usually adds that "it shall become divisible among the creditors," but that such a provision is absent in section 37 (1). It is also accepted—as pointed out by Bankes, L.J., in *Flower* v. *Mayor of Lyme Regis*[2] —that the effect of an order of annulment is to set aside the order under which the trustee or official receiver obtained his title to the debtor's property. It is further generally agreed that an order vesting property in the receiver under section 37 does not give him all the powers which he as a receiver in insolvency had. In *Panna Lal* v. *Official Reeciver*[3], *Jaing Bir Singh* v. *The Official Receiver*[4], In re *Anamale Chettyar* v. *R. K. Banerji*[5] and *Suleman* v. *Laxman*[6], it has been held that if there was an annulment, the insolvency ceases to exist and the Court becomes *functus officio* and if instead of returning the property to the insolvent it vests the same in an appointee it is only to put a "brake" upon the ex-insolvent's activities and make the properties available to creditors to proceed through a Civil Court. It is also recognised by these decisions that if in the case of an annulment following on a composition the Court still retains jurisdiction in insolvency it is due to the specific provisions in the Act to that effect. Notwithstanding these reasons there are a considerable number of decisions which have considered that "there are strong arguments of equity, necessity, commonsense as well as of law compelling the adoption of a different construction on the effect of vesting property in an appointee on an annulment under section 43, see *Jethaji Peraji Firm* v. *Krishnayya*[7], *Veerayya* v. *Srinivasa Rao*[1], *Official Receiver, Guntur* v. *Secretary of State for India*[8], *Venkatasubbiah* v. *Venkatasubbiah*[9], *Chennabasappa* v. *Official Receiver*[10]. *Venkatrayudu* v. *Narasimham*[11], *Nizam Khan* v. *Hukum Chand*[12], *Chouthmal Bhagirath* v. *Jokhiram Surajmal*[13], In re *Keshablal Dhar*[14], *Abdul Latiff* v. *J.R.Percival*[15]. What are these reasons of "equity, necessity, commonsense and law"? They are : *firstly*, though when the provisions of section 37 were originally enacted in the Insolvency Act, 1907, there was no such thing as annulment for default, still it being conceded that section 37 is modelled on English law and continues unaltered in spite of the provision for annulment on default being introduced, the control by Court contemplated by the original section 37 enabling the Court to distribute the estate through an appointee continues : *secondly*, the term "vest" in ordinary parlance when applied to the subject-matter of property gives the property in it and not merely control over it, *Coverdale* v. *Charlton*[16] : *thirdly*, to hold that after the order vesting the debtor's property in an appointee, the Court becomes *functus officio* would be to frustrate the very object for which the adjudication was annulled, namely, to bring home to the insolvent the consequences of his negligence and irresponsibility : *fourthly*, there will be no sense in vesting the properties in a third person, if he is to hold it for the benefit of the debtor : *fifthly*, if annulment is by way of punishing the debtor it is difficult to see why the creditors should be made to suffer ; for it is clear that if the creditors are left to their ordinary remedies at law there will not be any fair and equitable distribution amongst them and those that have got no decrees would be hopelessly handicapped as against those who may immediately proceed to execution and those who are aware of the annulment

1. (1934) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.).
2. (1921) 1 K.B. 488 (C.A.).
3. (1930) I.L.R. 53 All. 313.
4. (1933) I.L.R. 11 Rang. 287 (F.B.).
5. (1936) I.L.R. 14 Rang. 254 (F.B.).
6. A.I.R. 1938 Nag. 312.
7. (1929) 57 M.L.J. 116: I.L.R. 52 Mad. 648.
8. (1935) 69 M.L.J. 856: I.L.R. 58 Mad. 1014.
9. (1942) 1 M.L.J. 311.
10. (1943) 1 M.L.J. 127.
11. (1943) 2 M.L.J. 655.
12. (1941) I.L.R. 23 Lah. 330.
13. (1932) I.L.R. 12 Pat. 163.
14. (1932) I.L.R. 60 Cal. 259.
15. I.L.R. (1937) 1 Cal. 264.
16. 42 Q.B.D. 120.

will have an advantage over those who are not: *sixthly*, the vesting under section 37 in an appointee is not for any specified period and no conditions can be imposed upon him, though a reverter to the debtor can be coupled with conditions, thereby, indicating that an appointee is to hold till the estate is completely administered which means "that the general principles relating to distribution embodied in the insolvency law, being principles of justice and equity can certainly be applied." The considerations set out are weighty. Annulment under section 43 cannot "put the clock back" as if the adjudication had never been. To treat the appointee under section 37 as a "benevolent volunteer approved by the Court" does not seem to be proper. The view in the case under review that the appointee will have the power to realise the assets and distribute them is in consonance with the opinion favoured by most of the High Courts. Yet, having regard to the importance of the question, the sharp cleavage of opinion concerning it, and the frequency with which the point crops up, it is eminently desirable that the position should be set at rest finally either by a pronouncement of the Judicial Committee or by legislation.

BHUPAL CHANDRA SARKAR *v.* JAHAD BHUSAN SARKAR, I.L.R. (1943) 1 Cal. 56.

Under section 53-A of the Transfer of Property Act, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and the persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. The shield thus afforded to the transferee is available only as against the transferor or any person claiming under him, but is ineffective against third parties with independent rights, see *S.N. Banerji* v. *Kuchwar Limestone Company, Ltd.*[1], *Hindusingh* v. *Khetsingh*[2]. Can a person taking as heir to the last full owner on the termination of a limited estate be regarded as a person claiming through the limited owner with reference to the defence set up under section 53-A by the transferee from a Hindu widow for a "legal necessity" of property of the value of more than Rs. 100? Henderson, J., in the case under notice answered the question in the negative, (see *Jagad Bhusan Sircar* v. *Panna Lal Chandra*[3]) and on appeal that view was confirmed. In *Katama Nachiar* v. *Raja of Shivaganga*,[4] the Privy Council observed in connection with a Hindu widow's estate that "the whole estate would for the time be vested in her absolutely for certain purposes though in some respects for a qualified interest." Drawing support from this observation, in *Balaram* v. *Kewalram*[5], Niyogi, J., has remarked: "If her acts bind the property they must bind the reversioner in the same manner and to the same extent as the acts of any absolute owner would bind his heir. The reversioner may not be her heir but is certainly her successor. To the extent that the reversioner is bound, he becomes a person claiming under her. Therefore it is open to the purchaser to pray in aid the equity doctrine of part performance (under section 53-A) to make good any formal defect in the widow's transfer in so far as it is binding on herself." However equitable this construction may be, it does not seem to be justified by the language of section 53-A. A person is said to claim "under" another when he derives his title through the latter. Niyogi, J., in the passage cited concedes that the reversioner is certainly not the widow's heir. *Ergo* his title is derived through her husband only, a different thing altogether. The fact that the transfer was supported by legal necessity will be relevant only in so far as it enables a limited owner to pass an absolute title to the alienee. It cannot however be invoked for supplying a want of capacity or for curing the absence of a necessary formality in regard to the transaction. In *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari*[6], in connection with a mortgage by one of two co-widows, Sir Richard Couch observed that "even if there was a sufficient necessity, that necessity would not render a mortgage by one widow without the concurrence of the other binding upon the joint estate which had descended to the co-widows from their husband so as to affect the interest of the surviving co-widow after the

1. A.I.R. 1941 P.C. 128.
2. (1938) N.L.J. 123.
3. A.I.R. 1941 Cal. 287.
4. (1861) 9 M.I.A. 543, 604 (P.C.).
5. A.I.R. 1940 Nag. 396.
6. (1892) L.R. 19 I.A. 184; I.L.R. 16 Mad. 1 (P.C.).

death of the mortgagor." If the existence of a binding necessity would not be material and could not supply the lacuna caused by the absence of the concurrence of the other co-widow how can it, in a case where the formalities required by law in respect of a sale of property of the value exceeding hundred rupees have not been complied with, cure the defect so as to render the transaction valid? The reasoning of Niyogi, J., founded on the existence of legal necessity thus fails and on his concession that the reversioner is not the widow's heir he is not a person claiming under the transferor and therefore wil not be affected by the plea of part performance. The view to that effect in the instant decision is thus more acceptable than the opinion expressed in the Nagpur case.

PROVINCE OF BENGAL *v.* RAM CHANDRA BHOTICA, I.L.R. (1943) 1 Cal. 69.

A point under the Land Acquisition Act on which a later pronouncement of the Madras High Court seems to have taken a different view came up for consideration in the above case. According to the Calcutta High Court, on a reference to the Court under section 18, on an objection to the amount of compensation awarded, the claimant cannot before the Court be permitted to amend his application for increasing his claim to compensation; nor can the Court award a sum in excess of the original sum claimed as a fair compensation. In the case in question compensation for trees had been claimed at Rs. 2,800 originally. The award gave Rs. 400. In the application to the Collector asking for a reference to the Court under section 18 the claimant stated that he should be paid Rs. 1,500. After the matter came before the Court the claimant was allowed to amend his application and to claim compensation to the extent of Rs. 10,000. The amendment was held by the High Court to have been wrongly allowed and was set aside. In *Zemindar of Ettayapuram*, In re[1], the facts were almost similar. The original claim was for compensation at 12 annas per square foot. At the time of asking for the reference the claimant asked for compensation at 8 annas per square foot. After the reference to the Court he wanted to claim at 12 annas per square foot and preferred an application to amend his claim. It was held by Byers, J., that "all that the claimant had to do was to state in his application (for reference to the Court) that he objected to the amount of compensation awarded and it was not incumbent upon him to state whether he claimed compensation at the rate of 12 annas as originally demanded by him or whether he limited it to some lesser extent; that the maximum and minimum which can be awarded by the Subordinate Judge are clearly indicated in section 25 (1) o the Act," and. . . . "the Subordinate Judge is not limited in framing his award to any figures mentioned by the petitioner in his application" and the amendment was therefore unnecessary. In the case under notice, however, Edgley and Biswas, JJ., have held that on a reference the only matter which comes before the Court for its determination is whether compensation is to be at the figure specified in the award or at the figure claimed in the application for reference. In *Pramatha Nath Mullick* v. *Secretary of State for India in Council*[2], Sir George Lowndes laid down that the jurisdiction of a Court on a reference is confined to a consideration of the specific objection taken to the award and that where the only objection taken is to the amount of compensation that alone is the matter referred, and the Court has no power to determine or consider anything beyond it. The ruling in *Narayana Gajapatiraju* v. *Annapurnamma*[3] is also to the same effect. The matter is elucidated further by the Privy Council in *Mt. Bhagwati* v. *Mt. Ram Kali*[4], where Lord Porter has observed: "The Act does not require particulars to be given—it requires only the grounds of objection to be given, and by "grounds" their Lordships think, is meant such of the four grounds mentioned in section 18 (1) as are relied upon. . . . and no further particulars are required in order to comply with the terms of the sub-section." In *Revenue Divisional Officer* v. *Zemindar of Chemudu*[5], it is pointed out that "when an

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1. (1943) 1 M.L.J. 278.
2. (1929) 58 M.L.J. 223: L.R. 57 I. A. 10: I.L.R. 57 Cal. 1148 (P.C.).
3. (1941) 1 M.L.J. 527.
4. (1939) 2 M.L.J. 98: L. R. 66 I. A. 145: I.L.R. (1939) All. 460 (P.C.).
5. I.L.R. (1938) Mad. 479.

objection to the amount of compensation has been taken the Court has jurisdiction to work out the amount of compensation in a manner and on a basis different from that which has been adopted either in the statement of claim before the Land Acquisition Officer or in the objections against the award." While in the present case there is no advertence to the Privy Council ruling in *Mt. Bhagwati's case*[1], the observation in the Madras case is distinguished on the ground that in the present case there is no question of "adopting a different basis of calculation in respect of the compensation awarded to the claimant." There seems to be no warrant for confining the scope of the observation in the Madras case to a narrow compass. The clear statement of Lord Porter that what all is required by section 18 is a mention only of the specific or particular objection or objections among the four objections referred to by the section, to the award, and not any statement of particulars, would indicate that the view suggested in the Madras decision in In re *Zemindar of Ettayapuram*[2] is more in consonance with it than the one favoured in the case under notice.

BHANAMALI CHARAN BHUNIA *v.* DHARANI DHAR BHUNIA, I.L.R. (1943) 1 Cal. 154.

This case holds that a charge of cheating under section 417, Indian Penal Code will not lie for falsely inducing a complainant to compromise a case under section 408. To constitute cheating there must first be a deceit and the person deceived should have been taken in by the misrepresentation. Where the compromise can have no legal effect there is no question of damage to a person either in regard to his property or otherwise. In *Kumaraswami Chetti* v. *Kuppusami Chetti*[3], it was held that the composition or compromise in regard to an offence compoundable only with the Court's permission, is of no legal effect unless the Court has given its sanction. The same view is taken in *Naurang Rai* v. *Kedar Nath*[4]. The composition or compromise in the case of an offence which is non-compoundable will stand *a fortiori*. Even if some promise was made and the case was dropped the promise is not only not enforceable but it will also be open to the complainant to have the case revived if the Magistrate was so disposed. The agreeing to the compromise does not impart any efficacy to the arrangement, and thus, in the circumstances, the procuring of the consent, even if falsely made, cannot amount to the offence of cheating.

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1. (1939) 2 M.L.J. 98 : L.R. 66 I.A. 145: I.L.R. (1939) All. 460 (P.C.).
2. (1943) 1 M.L.J. 278.
3. (1918) 34 M.L.J. 217 : I.L.R. 41 Mad. 65.
4. (1928) I.L.R. 9 Lah. 400.

CHANDRA BHAN BILOTIA v. GANPATRAI AND SONS, (1943) 1 Cal. 156.

An interesting question raised in this case was whether arbitrators were bound to act only on what is strictly admissible evidence. Blagden, J., gave a negative answer and held that so long as the principles of natural justice were not transgressed an arbitrator could act on materials which may not be strictly admissible evidence under the Indian Evidence Act. Natural justice is "an expression sadly lacking in precision,"[1] but implies that though the person who is to adjudicate is not bound by the limitations of adjectival law attaching to a trial, the parties to the dispute should always be given a fair opportunity to know, correct or contradict any relevant statement prejudicial to them, *Board of Education* v. *Rice*[2].

In England, in regard to an arbitrator, in *Attorney-General* v. *Davison*[3], Alexander, L.C.B., has observed : "I have always understood that arbitrators are bound by the same rules of evidence as the Courts of law." In In re *Keighley, Maxstead* & *Co. and Bryan Durant* & *Co.*[4], Lord Esher no doubt remarked that an umpire is not bound by the strict rules of evidence strictly observed in a Court. This view has however been repudiated in Re *Enoch* & *Zaretzky Bock* & *Co.*[5], where Farwell, L.J., stated : "If it be taken literally, I can only say, with the greatest possible respect, that I think it is contrary to the law as stated in the Court of Exchequer and contrary to the established rule in our Courts. If all that was meant is that the Court will not be extreme to mark anything done amiss in respect of the reception of evidence unless substantial injustice results . . . then I should agree. It is plain that the Courts do allow considerable latitude, in practice at any rate, to the reception of evidence by umpires but to say as a general proposition that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice." Nor is the dictum of Lord Esher, in accord with the decision of the House of Lords in *East and West India Dock* v. *Kirk and Randall*[6]. Thus it is clear that an abritrator is bound by the rules of evidence and although parties may agree that the rules of evidence as observed in the Courts shall not be strictly followed, he must not admit and act upon evidence which is obviously inadmissible and which goes to the root of the question he has to decide, *Walford Baker and Co.* v. *Macfie and Sons*[7]. The law as summed up in Halsbury[8] is : Subject to any directions which may be contained in the submission itself, "he should observe, so far as may be practicable, the rules which prevail at the trial of an action in Court, but he may deviate from those rules, provided that in so doing he does not disregard the substance of justice."

Is the Indian law in any way different ? The Evidence Act purports to be a complete codification of the law of evidence and by section 1 it is expressly said not to apply to arbitrators. In *Pratap Singh* v. *Kishan Prasad*[9], it was stated : "An inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a Court of law." A number of decisions have held that an arbitrator is not bound by rules of practice which Courts of law adopt for general convenience nor bound by the adjective law laid down in the Civil Procedure Code and the rules made under it or the rules relating to evidence to be found in the Indian Evidence Act, so long as he acts in consonance with the principles of justice, equity and good conscience ; he has greater latitude than the Courts of law in order to do complete justice between the parties, *Badruddin Hasan* v. *Amir Begam*[10], *Narsingh Narayan Singh* v. *Ajodhya Prosad Singh*[11]. This means only, in the words of Foster, J., in *Abdul Halim* v. *Ismail*[12] that "no doubt an arbitrator is ordinarily free from the fetters of adjective law but that does not make him free from the fundamental principles of justice." The decision in *Suppu* v. *Govinda Charyar*[13] that an award of the arbitrators cannot be set aside on the ground that they have not acted in strict

1. Per Hamilton, L.J., cited in *Local Government Board* v. *Arlidge*, (1915) A.C. 120.
2. (1911) A.C. 179.
3. 4 M'Cl. & Y. 160, 166.
4. (1893) 1 Q.B. 405, 411.
5. (1910) 1 K.B. 327 (C.A.).
6. (1887) 12 A.C. 738.
7. (1915) 84 L.J. K.B. 2221.
8. 2nd edn., vol. 1, p. 652, para 1103.
9. A.I.R. 1932 Bom. 68.
10. (1911) 13 I.C. 520.
11. (1911) 16 C.W.N. 256.
12. A.I.R. 1925 Pat. 465.
13. (1887) I.L.R. 11 Mad. 85, 87.

compliance with the rules of evidence should be understood as in no way militating against the proposition that though the arbitrator enjoys a certain amount of latitude in the matter of reception of evidence and though the rules of the Evidence Act do not strictly apply to him, yet, if he acts in a manner disregarding the " substance of justice " or in violation of the principles of natural justice, his award is liable to be set aside.

BARASAT BASIRHAT LIGHT RAILWAY CO. LTD. *v.* NRISINGHA CHARAN NANDI CHAUDHURI, I.L.R. (1943) 1 Cal. 173.

This case decides a novel point practically uncovered by authority. It holds that the liability of the bed of a natural navigable stream at any point in its course to pass the water received from the upper reaches on to its lower part without material diversion in volume cannot be regarded as an "encumbrance" which will be wiped out on an acquisition of the bed of the stream at the particular point under section 16 of the Land Acquisition Act. In the present case the bed of a natural navigable watercourse under a railway bridge had been acquired in land acquisition proceedings from the plaintiff to whom the watercourse belonged for purposes of the railway. The watercourse had been fetching an income to the plaintiff by way of tolls levied on country craft plying along it. After the acquisition the railway company diverted the water at the point where the bed belonged to them into certain burrow pits excavated along the embankment of the railway line by deepening them and converting the same into a channel. The result was that there was no longer enough water for the craft to ply. In a suit for damages by the plaintiff against the railway company, it was contended that inasmuch as the burden resting upon the acquired portion of the bed of the watercourse of passing the water received by it from its upper portion to its lower portion was an "encumbrance" within the meaning of section 16 of the Land Acquisition Act, it was therefore extinguished by the acquisition proceedings. In *The Government of Bombay* v. *Esufali Salebhai*[1], it was stated that "to acquire land is not necessarily the same thing as to purchase the right of fee simple to it; but means the purchase of such interests as clog the right of Government to use it for any purpose they like". "Land" is defined in section 3 (*a*) as including benefits to arise out of land and section 3 (*b*) suggests that an easement will be an "encumbrance" within the meaning of section 16. That "encumbrance" is sufficiently wide to cover a customary right has been recognised in *George High School* v. *Abdul Karim*[2]. Whether it is an easement or customary right it is one that has come into existence through human agency and is not attributable to natural causes. The dictionary meaning of the term "encumbrance" refers to it as a claim, lien, liability attached to property; as a mortgage, etc., and suggests that it is a burden created by acts or omissions of human beings and not one created by nature. The German "kummer", the equivalent of "cumber" is synonymous with "trouble" and gives a clue to its real meaning, that it is of man's own making.

ADEMMA *v.* SATYADHYANA THIRTHA SWAMIVARU, (1943) 2 M.L.J. 289.

Two points of considerable interest are dealt with in the above decision. Section 3 (2) (*d*) of the Estates Land Act as amended by Act XVIII of 1936 includes within the definition of an estate "any inam village of which the grant has been made, confirmed or recognised by the British Government" and under section 6 every ryot in possession on the 30th June, 1934 or admitted subsequently by a landholder to possession of ryoti land situated in such estate shall have a permanent right of occupancy. Whether a ryot can claim the statutory right of occupancy in inam lands thus turns upon whether the grant was of a *village* and whether the latter term should be understood as subsuming all the lands without any exception being made. The definition of "village" in section 3 (19) is scarcely helpful. It only states that "village" means any local area situated

1. (1910) I.L.R. 34 Bom. 618, 624-625. 2. A.I.R. 1935 All. 895.

in or constituting an estate which is designated as a "village" in the revenue accounts. It does not touch the question whether for purposes of section 3 (2) (*d*) the grant in inam should be of the entirety of the lands or whether a grant of substantially all the lands in inam would suffice. The decision in *Mandalaswami* v. *Lakshminarasamma*[1] only states that even if the lands did not form a village at the time of the inam grant, if subsequently at the time of the confirmation or recognition of the same by the British Government the lands are recognised as constituting a village by the revenue authorities, that will suffice. The decision only states that though the lands concerned had formed part of a village only at the time of their grant they would yet be an estate within the meaning of section 3 (2) (*d*), if subsequently at the time the grant was confirmed by the British Government, they had been recognised as a village with a separate revenue establishment and separate revenue accounts. Construing the section strictly a village can be said to be granted in inam only when the entirety of the lands comprising it are granted see *Secretary of State* v. *Mallayya*[2] and *Secretary of State* v. *Thinnappa Chettiar*[3]. The *Swamigal case*[4] shows that where a grant purports to be a whole village inam the fact that the words "besides poramboke" are not inserted in the grant will not in any way derogate from the plenary character of the grant. Where on the other hand there is evidence to show that what was granted was something less than the total area of the village, that a portion however small had been granted to another or reserved by Government, can the grant admittedly of less than the arithmetical unity constituting the village be nevertheless regarded as a grant of the whole village? In the instant case, the question has been answered in the negative, the grant being of 128.22 acres out of the total area of 158.23 acres. The same view has been taken in *Suri Reddi* v. *Agnihotrudu*[5]. The position may now be taken as settled beyond doubt.

The other point of interest that was raised was whether a grant of lands to the deity of a math for *nitya naivedya deeparadhana* could in the circumstances of the case be regarded as a grant on "service tenure". The importance of the point lies in the fact that if the lands could be so regarded, they will cease to be ryoti land during thc subsistence of the service tenure and no occupancy rights can be acquired therein by a lessee of the lands or a cultivating tenant. In view of the finding that the grant was less than a whole village it was considered by the learned Judges that it was "not necessary to embark on a discussion of the first respondent's contention that the grant here was a grant for service". Their lordships however added : "It may however be mentioned that the entries in the Inam Register are strongly against the contention". It is not clear which particular entry or entries militated in their Lordships' opinion from the grant being regarded as one for service. The observation no doubt is obiter but in view of the importance of the question the matter deserves to be probed. In passing it may be recalled that the ruling in *Sadasivarayudu* v. *Vekataswami*[6] has recognised that even an entire village may fall within the scope of the exemption from ryoti land afforded by section 3 (16) (*c*). Ordinarily as indicated in *Radhakrishna* v. *Balambhat*[7] in the case of a grant for service either the grantee should have been appointed to a particular office the performance of whose duties was intended to be remunerated by the grant of land or the grant must have annexed to it any condition of service, the service being of a specific character, military, religious or village service. Section 3 (16) (*c*) refers only to the object of the grant. In the case of a devadayam granted for the support of a temple or for the performance of any service in the temple can it be said that it is a service grant? Does the fact that the grantee is the idol itself make any difference? As pointed out by Varadachariar, J., in *Board of Commissioners for Hindu Religious Endowments, Madras* v. *Veeraraghavalu*[8] : "The principle of the legal personality of an idol and of the

1. C.R.Ps. 1007 to 1014 of 1942.
2. (1932) 63 M.L.J. 649 (P.C.).
3. (1943) 2 M.L.J. 382 (P.C.).
4. (1942) 2 M.L.J. 367 : L. R. 69 I. A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
5. (1943) 2 M.L.J. 528.
6. (1931) 62 M.L.J. 598.
7. I.L.R. (1938) Nag. 27.
8. (1937) 2 M.L.J. 368.

vesting of property in such personality cannot be taken quite literally. . . . . The purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner". Thus the maintenance of a temple or the performance of any service therein is really for the benefit of the public. By the objects being meticulously carried out a service is done to the members thereof. So regarded it is not merely a case where the grant is made, for instance, in favour of a pujari or a cymbal player or a florist serving in the temple that would fall within the ambit of a service grant but also a case where the grant is made to the institution itself either for its maintenancc or for such purposes as *nitya naivedya deeparadhana.* In Appeal No. 193 of 1940, while holding that where the grant had been in the name of the deity and there had been no alienation by the trustee of the temple, the disputed alienation having been made by an archaka claiming the land as his, section 44-B of the Hindu Religious Endowments Act cannot be properly invoked, the learned Judges seem to have observed that the finding of the lower Court that the lands "do not constitute a grant for the performance of a charity or service stands". This remark is also obiter and is moreover not in accord with the observations of Varadachariar, J., cited *supra,* that the grant standing in the name of the deity is not to be understood in its literal sense and that the grant is really for the benefit of the publie and serves them that way. In Selections from the Records of the Madras Government New (Revenue) Series : No. 1 : A Collection of Papers relating to the Inam Settlement in the Madras Presidency,[1] it is stated that inams granted for the support of pagodas, muttums, mosques and durgas, Christian churches, etc., are inams for religious service. This shows that the Government itself seems to have had a consciousness that all inams granted in favour of a temple will be religious service inams. It is submitted that there is no warrant for departing from that view in construing section 3 (16) (*c*) of the Estates Land Act.

JITENDRA CHANDRA RAY CHAUDHURI *v.* S. N. BANERJEE, (1943) 1 Cal. 101. A question turning on the construction of section 63 of the Indian Contract Act, on which a cleavage of opinion between the Madras and Calcutta High Courts is revealed, fell to be decided in this case which holds that it is open to a promisee to remit a portion of the obligation without consideration therefor or a fresh agreement, though the obligation on the part of the promisor to perform the unremitted part still continues. The Madras view is to be found in *Ramaswami* v. *Rudrappa*[2], where it has been held that no doubt no consideration is necessary if a portion of the debt is actually remitted but that actual remission is not completed until the creditor accepts the part payment in full satisfaction. Reliance was placed in support of the view on illustrations (*b*), (*c*) and (*d*) to section 63. Examining the section itself it is apparent that it has three limbs and it provides for the promisee acting in three different ways. In the first place he can dispense with or remit performance of the obligation either wholly or in part; secondly, he can at his discretion extend the time for performance of the contract; or lastly, it is open to him to accept any satisfaction which he considers proper. Turning to the illustrations, while illustration (*a*) contemplates a case of total remission, illustrations (*b*), (*c*) and (*d*) fall within the purview of the third clause under which a substituted satisfaction is accepted and the original obligation is extinguished. This analysis of the section shows that quite apart from accepting performance of less than what is due under the contract, the promisee can act under the first part of section 63 and remit performance either wholly or in part. This would give a meaning to every part of the section and would avoid the first part being deemed otiose or as overlapping the third part. The weakness of the Madras view is that this distinction does not seem to have been appreciated.

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1. Published in 1906, p. 350. para 11 citing G.O. No. 337 Rev. dated 24th Feb. 1871; *see also* Land Tenures in the Madras Presidency by Sundararaja Iyengar, 2nd edn., pp. 260, 261.

2. A.I.R, 1939 Mad. 688.

While under the third clause of the section the original contract is altogether extinguished, under the first part a portion of the performance may be remitted and the rest left intact. The reference in the Madras case to illustrations (*b*), (*c*) and (*d*) indicates that the learned Judges thought that a case of remission fell under the last clause of section 63. Again, that for section 63 to apply, an entire extinction of the contract is not necessary is made clear by the second part of the section which entitles the promisee to extend the time for the performance of the contract. Nor is there anything in section 63 to limit its operation to cases where the performance has already fallen due. It cannot be said that where the alleged remission relates to a future liability it can amount only to an agreement to remit. There is no reason why a future liability, such as for instance to pay interest on the principal borrowed, may not be remitted in *praesenti*. Since such a case also will be one of actual remission no bar of evidence can arise under section 92 of the Evidence Act. *Maung Pu* v. *Maung Po Thaut*[1]. The statement expressing such remission, even if oral, does not contradict or vary the terms of the original contract. The terms remain intact and the effect of the remission comes in only after the terms operate fully.

Should the remission then in whole or in part, orally or in writing, of the original obligation be supported for its efficacy by consideration? In *Chunna Mal—Ram Nath Firm* v. *Mool Chand—Ram Bhagat*[2] the Privy Council has laid down that under section 63 a promisee can effectually dispense with performance of a contract in whole or in part without either an agreement by the promisor or consideration for the dispensation. According to the Privy Council "the language of the section does not refer to any such agreement and ought not to be enlarged by any implieation of English doctrines". In their treatise on the Indian Contract Act (6th edition, p. 363 f. n.) Pollock and Mulla remark that the Privy Council decision in the Lahore case "appears to overrule the opinion (in any case difficult to understand) of the Rangoon High Court that if the remission is in the form of an agreement it requires new consideration". In the result the view found in the case under notice that there can be actual remission of a part of the obligation under a contract though the rest of it remains to be performed and that it is open to the promisee by a unilateral act of grace to so absolve the promisor without any consideration seems to be justified both by the language of section 63 and the exposition by the Privy Council of its scope.

GAJA NAND CHAUDHURI *v.* HARI BUX LAHOTY, I.L.R. (1943) 1 Cal. 195.

This decision holds that where an agreement constituting an adjustment of a decree is oral, evidence of it is not inadmissible under section 92 of the Evidence Act in proof of the same. The proposition was laid down on objection being raised to the reception of such evidence in the course of an application by the judgment-debtor under Order 21 rule 2, Civil Procedure Code for a notice to issue to the decreeholder to show cause why the adjustment of the decree should not be certified. The point however is one regarding which, in the words of Pandrang Row J., in *Papamma* v. *Venkayya*,[3] "there is a conflict of opinion well nigh irreconcilable". *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*[4] and the unreported decision of the Madras High Court in Second Appeal 62 of 1920 represent the two contrary views and the other cases more or less follow the one or the other of the two. According to the former decision the words "any matter required by law to be reduced to the form of a document" in the earlier part of section 92, Evidence Act are controlled by the expression "as between the parties to any such instrument or their representatives in interest" in the later part of the section which are applicable only in the case of documents of a dispositive character and the former words have therefore a narrower scope in section 92 than in section 91 and cannot cover the case of a decree; so much so,

1. (1928) I.L.R. 6 Rang. 191.
2. (1928) I.L.R. 9 Lah. 510; L.R. 55 I.A. 154 : 55. M.L.J. 1. (P.C.).
3. (1935) I.L.R. 58 Mad. 994 : 69. M.L.J. 451 (F. B.).
4. A.I.R. 1914 Cal. 697 : 24 I.C. 391.

evidence of an oral agreement adjusting the decree is not shut out by the section. This view has been followed in a later decision of that High Court in *Ananda Priya* v. *Bijoy Krishna*[1]. In Madras, in Second Appeal No. 62 of 1920, Napier J., considered the result of the Calcutta ruling in *Debendra Narain Sinha's case* as "certainly startling" and thought that under that view immediately after a decree "it would be open to one of the parties to come into court with a fresh suit the next day saying that directly after the decree was passed the parties made an agreement to vary its terms". The criticism however overlooks the provisions of section 47 and Order 21, rule 2, Civil Procedure Code. Napier J, also thought—Krishnan J. agreeing—that a decree was an instrument between the parties to the suit in which the decree was passed. This point does not allow for the real nature of a decree. The decision in the second appeal was however followed in *Raja of Kalahasti* v. *Venkatadri Rao*[2] where it was held that an oral agreement to adjust a decree offends against the terms of section 92 of the Evidence Act and cannot be proved ; and again by a single Judge in *Gopalakrishna Iyer* v. *Sankara Iyer.*[3] The Full Bench ruling in *Papamma* v. *Venkayya*[4] has however taken a different view regarding the applicability of section 92 to decrees.

In Allahahad, in *Lachhman Das* v. *Baba Ramnath Kalikamliwala,*[5] Walsh J, observed obiter, that an oral agreement adjusting a decree is clearly a matter contradicting or varying the terms of the original decree and that evidence of it cannot therefore be admitted by reason of section 92. A later ruling in *Ganga Dihal Rai* v. *Ram Oudh*[6] has dissented from that view. In that case on the taking out of execution by the decreeholder, the judgment-debtor set up an oral adjustment and asked the Court to record it, the application being in time, *i.e.*, within 90 days as required by Article 174 of the Limitation Act. Sulaiman A.C.J., held that section 92 of the Evidence Act is not a bar to the agreement being proved, that a decree is not an instrument between the parties in the sense in which that expression is used in that section and is not covered by it ; that proof of a subsequent oral agreement cannot be said to amount to varying or contradicting the decree and hence oral evidence of the adjustment under which a part of the decree was paid and the rest agreed not to be executed against the judgment-debtor is not inadmissible.

In Bombay in *Kalyanji Dhana* v. *Dharamsi Dhana and Co.*[7], a similar opinion has been expressed and it is stated that if the adjustment is certified as required by law it can be acted upon and proved and that it is not necessary that such agreement should be in writing. The same view has been adopted by the Rangoon High Court in *Ma Shwee Pee* v. *Maung San Myo*[8] and by the Lahore High Court in *Abdul Karim* v. *Hakam Multani Lal.*[9]

The Full Bench ruling of the Madras High Court in *Papamma* v. *Venkayya*[4] has pointed out that a decree does not fall within the purview of section 92 of the Evidence Act so as to preclude evidence of a subsequent oral adjustment being let in and that the correct approach to the question had been missed in the earlier decisions. According to Pandrang Row, J., a decree is not an act of the parties at all but an act of Court. Only a Court can bring it into existence and only a court can vary or nullify it. A decree or its terms cannot be modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of a decree whether the agreement is written or oral. The rule of exclusion in section 92 implies that but for it the agreement could in law vary the terms. Where, therefore, no such variation by agreement, whether written or oral, is possible, the rule of exclusion cannot apply, and this is the case with a decree. The law does not contemplate a variation of decrees of Court by mere agreements. Artempts to so vary are guarded against

1. A.I.R. 1926 Cal. 643 : 91 I.C. 705.
2. (1927) I.L.R. 50 Mad. 897 : 53 M.L.J. 533.
3. A.I.R. 1930 Mad. 673.
4. (1935) I.L.R. 58 Mad. 994 : 69 M.L.J. 451 (F.B.).
5. (1921) I.L.R. 44 All 258, 264.
6. A.I.R. 1929 All 79.
7. A.I.R. 1935 Bom. 303.
8. (1928) I.L.R. 6 Rang. 573.
9. (1933) I.L.R. 14 Lah. 668.

not by any rules of evidence but by rules of procedure, such as those relating to amendment of decrees, appeal, review and execution.

The above exposition coupled with the repudiation of its earlier view by the Allahabad High Court in its later pronouncement and the unanimity of opinion in the other High Courts show that provided that the agreement can be recorded or certified under Order 21 rule 2 of the Civil Procedure Code being within the time permitted by law, it can be proved for such purpose ; and the conclusion reached in the case under notice is thus in accord with the previous rulings on the point.

KSHETRA MOHAN DAS *v.* BASU, I.L.R. (1943) 1 Cal. 313.

The nature of the relationship that arises between the parties, where an employee deposits a sum of money with his employer by way of security for the due performance of his services, whether it constitutes a loan or creates a trust has often come up before the courts and has been marked by a cleavage of judicial opinion which still persists. The principles in cases of this kind seem to be clear and settled but their application to concrete cases is often a matter of great difficulty. It must no doubt depend essentially on the facts and circumstances of each case. But it is the particular line of approach to the question that has made all the difference in regard to the result.

In *Halsbury's Laws of England*,[1] it it stated that property which is in the possession of the bankrupt for a specific purpose does not ordinarily pass to the trustee but is clothed with a species of trust and is subject to the same principles as trust property. If a specific purpose is declared a trust results. In *Toovey* v. *Milne*,[2] in regard to the return of a sum of £ 120 advanced to a person for settling with his creditors on the settlement not being effected, Abbot, C.J., remarked that as the money was advanced for a specific purpose it was therefore clothed with a specific trust. So also in *Farley* v. *Turner*,[3] money had been sent to a bank with an intimation that it was to be applied for a particular purpose. Due to certain reasons the money was never applied for the specific purpose. It was held that there was a trust in respect of the amount. Likewise in *Edwards* v. *Glynn*,[4] money had been advanced to save a bank from a run on it, but the purpose could not be achieved. The money was therefore returned to the lender. On the question whether the advance gave rise to a loan or a trust, Earle J., observed "this was a specific advance for a specific purpose on the understanding that the money if not used for that purpose should be returned" and therefore gave rise to a trust. The principle thus seems to be that when a sum of money is handed to another person who accepts it for a purpose declared at the time, a binding trust is constituted in respect thereof. On this test the fact that the depositee is a bank is immaterial. Nor does it matter that in a certain contingency the depositee might have recourse to the deposit or that there is a stipulation to pay interest on the deposit money. It is true that a trustee cannot deal with trust property for his own benefit. The rule however is not inflexible. It is subject to the qualification "unless otherwise provided for", *Bray* v. *Ford*.[5] The instrument of trust may empower such user. *In re Sykes*[6] affords an illustration. The ruling in *Gee* v. *Liddel*[7] shows how a provision for payment of interest is not incompatible with trust relationship. There the testator had directed his executor to stand possessed of £ 2000 upon trust to retain the same in his own hands paying interest at 4 per cent. or to invest it and pay the interest to his daughter for her separate use during her life. The provision thus permitted the trustee to retain the money in his own hands and pay interest at a specified rate to the beneficiary, the trustee presumably being entitled to make such use of the capital by way investment or otherwise. Yet no question arose as to the direction creating a trust.

The Indian law does not seem to be different. Section 51 of the Indian Trusts Act states that a trustee "may not use or deal with the trust property for his own

1. Vol. 2, p. 228, Hailsham edition.
2. (1819) 2 Bl. & Ald. 683 ; 106 E.R. 514.
3. (1856) 26 L.J. Ch. 170.
4. (1859) 2 El. & El. 29 : 121 E.R. 12.
5. (1896) A.C. 44, 51.
6. (1909) 2 Ch. 241.
7. (1866) 35 Beav. 621 ; 55 E.R. 1038.

profit." It is the word "may" and not the word "shall" that is employed. Anyway, in *Official Assignee* v. *Krishnaji Bhat*,[1] it is recognised that it is open to the settlor to make a provision to the contrary and remove the trustee's disability without the trust being in any way affected. In that case certain monies were handed over in trust to a firm of jewellers and acting on the permission of the author of the trust, the trustees instead of keeping the trust funds separately or earmarked used it in their private business, paying interest annually on the deposit money. It was held that these facts notwithstanding, the trust relationship was not affected ; see also *Official Assignee* v. *Muthayee*.[2]

The permission to use the security deposit as a necessary implication arising from a provision for payment of interest on the deposit amount coupled with the absence of any stipulation to treat the deposit as "a segregated fund" has led the courts in a number of cases to treat the deposit as a loan only and as negativing a trust : see *Messrs. Arbuthnot & Co.* v. *Sabapathy Mudaliar*,[3] *Malvankar* v. *Credit Bank of India Ltd.*,[4] *In re Manekji Petit Manufacturing Co., Ltd.*[5] The same view has been taken in some decisions even subsequent to the ruling of the Privy Council in *Krishnaji Bhat's case*,[1] see *The National Petroleum Co.. Ltd.* v. *Popatlal Mulji*,[6] *Maheswari Brothers* v. *Liquidators, Indra Sugar Works*,[7] and same case on appeal.[8] The same conclusion has been reached also in cases where there was no stipulation for payment of interest on the deposit, In the matter of *Annapurna Co., Ltd.*,[9] *Ram Chand* v. *Mohamed Akram Khan Saheb*[10]. That where at the time of making the deposit the specific purpose for which it is made is declared and the parties are fully aware of it, it is a trust that arises notwithstanding a provision for payment of interest on the deposit amount is the opinion laid down in In re *Bengal Zemindari and Banking Co., Ltd.*,[11] In the matter of the *Hindusthan Commercial Bank Ltd.*,[12] *Gopalkrishnan* v. *Official Liquidator, T. N. & Q. Bank Ltd.*[13] In the first of these cases however it had been expressly stated at the time of the deposit that the money was to be deemed to be held in trust, and referring to that provision Lort-Willams J., remarked. "If it had not been for these specific terms, the fact that the bank had agreed to pay interest upon the security might have militated against the position taken up by the petitioner, because in the ordinary way, if the bank had to pay interest upon the security, it might be assumed that it was intended that it should use the money in the banking business like any other deposit so as to enable it to earn the interest which it had to pay to the cashier on his security deposit." That a provision for the trustee deriving benefit through the user of the trust fund is not inconsistent with the trust relationship is borne out by section 3 of the Indian Trusts Act where the trustee (*the owner*) is contemplated as not disqualified to be a beneficiary as well. Likewise that a provision for payment of interest on the deposit is not incompatible with the continuance of the fiduciary relationship is recognised by decisions, see In re *Alliance Bank of Simla Ltd*[14]., and In re *Fazalbhai Mills Ltd.*[15] The decisions advocating the view, that in the case of security deposits, only a debtor and creditor relationship arises have failed to appreciate that the position is the other way in English law whenever the special purpose for which the deposit is made is declared at the beginning, that the Indian law is not different from the English law, that the only relevant factor or criterion in such cases is whether the deposit was declared to be made for a specific purpose and the parties were aware of that fact and that when once a trust relationship springs into existence it will not be affected or extinguished by a provision for payment of interest on the deposit or by authorisation of the user of the deposit money by the trustee in his business. The view taken in the case under notice is in conformity with the law so set out.

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1. (1933) 65 M.L.J. 1 : I.L.R. 56 Mad. 570 : L.R. 60 I.A. 203 (P.C.).
2. 1937 M.W.N. 493.
3. (1912) 23 M.L.J. 221.
4. (1914) 27 I.C. 343.
5. A.I.R. 1932 Bom. 311.
6. (1936) I.L.R. 60 Bom. 954.
7. I.L.R. (1938) All. 896.
8. I.L.R. (1942) All. 242 (F.B.).
9. A.I.R. 1926 All. 397.
10. A.I.R. 1937 Lah. 444.
11. I.L.R. (1937) 2 Cal. 305.
12. A.I.R. 1938 Mad. 651.
13. (1939) 1 M.L.J. 209.
14. A.I.R. 1924 Cal. 818 : 28 C.W.N. 721.
15. (1936) 38 Bom.L.R. 542 : A.I.R. 1936 Bom. 296.

NIRANJAN DAS MOHAN *v.* ENA ELIZABETH SINGH, I.L.R. (1943) 1 Cal. 340.

One of the points decided in this case was that in regard to a marriage solemnised under the Special Marriage Act, 1872, it would be sufficient if, at the time of making the declaration required by the statute, neither of the parties professed the Christian or any of the other specified religions and that what the parties then were or were not at heart is irrelevant. Section 2 does not postulate the presence of a positive element, but requires only a negative, namely, that the parties to the marriage thereunder should not profess any of the specified religions. This is borne out and implemented by para 2 of the second schedule which sets out the form in which the declaration by the parties should be made before the Marriage Registrar. The statement should be : "I do not profess the Christian . . . . religion." To what point of time that fact should relate finds no mention in that para but by correlation with para 1 it falls to be understood that it refers to the condition at the time of the marriage. Two remarks fall to be made : firstly, the statute does not call for an affirmation of faith ; in fact, neither of the parties may have any religious faith at all : secondly, antecedent facts are irrelevant, for it is the state existing at the time of the declaration that has to be expressed. What then does it matter if either of the parties had been born a Christian, or had been baptised at the Christian church, or had attended church regularly or had been treated as a Christian ? None of these factors is incompatible with the party not having any real faith in Christianity. It may be a superficial label that the party was all along wearing. Though to prove one's faith what one believed at heart may have to be probed, to prove that one has no faith one's declaration must be self sufficient for true faith is inconsistent with suborning. The term "profess" means "openly declare or affirm allegiance to or faith in". The Special Marriage Act requires only the statement of a negative and when that has been done, surely there is no necessity for anything more. It was perhaps considerations like these that have led the Courts to hold that a declaration under Act III of 1872 for purposes of marriage could not be taken as an abjuration of religion for all purposes but should be understood merely as a statement for the occasion only and for the purposes of the Act ; see In re *Gnanendranath Roy*[1], *Vidyagavri Harbovandas* v. *Naraindas Kashidas*[2], and *Emperor* v. *Walter*[3].

That the state of mind of the declarant is not material follows also from the fact that the Court will otherwise be called upon to enter into an elaborate inquiry into the religious faith of the parties which, from the very nature of things, will be impracticable in most cases. Further section 17 of the Act invalidates a marriage only on the four grounds set out therein, of which belonging at heart to some one of the specified religions contrary to the terms of the declaration is not one. That other grounds will not lead to the avoidance of the marriage is apparent from section 21 which, only prescribes a penalty for signing a false declaration but, does not avoid the marriage itself on the ground of the false recital.

AHMED MAHOMED *v.* BAI FATMA, I.L.R. (1943) Bom. 38.

Excursions into the tangled jungle of juristic semantics are no doubt not desirable, but often a seemingly simple word gives rise to conflicting interpretations detracting from the certainty that should characterise a rule of law and its significance falls in consequence to be ascertained. In the instant case appropos of the question whether on attainment of majority a child's right to maintenance against its father under section 488, Criminal Procedure Code will cease, it was held that in the context the word 'child' is used in reference to the father and without qualification of age—the only qualification being that it should be unable to maintain itself—and hence attainment of majority *per se* will not lead to the cessation of the right to maintenance that was running.

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1. (1923) I.L.R. 49 Cal. 1069 at 1072.
2. A.I.R. 1928 Bom. 74.
3. A.I.R. 1934 Oudh 155.

Section 488 is not a new provision enacted in 1898. The same provision was found in the code of 1882 and the codes of 1875 and 1872 and section 316 of Act 25 of 1861 contained a provision similar to section 488 (1). The dictionary meaning of the term ' child ' does not take the matter far. A ' child ' is said to mean *inter alia* (1) a young person of either sex, especially one between infancy and youth ; (2) a male or female descendant in the first degree. In *Krishnaswami Ayyar* v. *Chandravadana*[1], Sankaran Nair, J., observed that in England the word ' child ' has got apparenily various statutory definitions, but that in the absence of any definition or anything to the contrary in an Indian enactment like the Criminal Procedure Code, a ' child ' means a person who has not reached full age, a person who is incompetent to enter into any contract, that is, a person below 18 years of age. Another Madras ruling, *In re Moideen*[2], by its approving reference to the decision in In the matter of *the petition of W. B. Todd*[3], which had held that a child though it may have attained majority, if incapable of maintaining itself, will have a right of maintenance against its father seems to favour a more liberal interpretation of the term ' child ' than that found in the earlier Madras case. A still later Madras ruling, *Kent* v. *Kent*[4], has also taken the view that a grown up child (a major) will be entitled to get maintenance if it is unable to maintain itself, from the father if he has the means. The construction adopted in *Krishnaswami Ayyar's case* has however been followed by the Calcutta High Court in *Hemantakumar Banerji* v. *Manorama Debee*[5], by the Lahore High Court in *Mt. Shanno Devi* v. *Daya Ram*[6] and by the Judicial Commissioner's Court of Nagpur in *Gangaramsa* v. *Vishnusa*[7]. In Lahore, however, a Judge of the Punjab Chief Court, Chevis, J., in *Bhagat Singh* v. *Emperor*[8], had held that the reference to age is purposely omitted in section 488, the object being that any son or daughter should be entitled to maintenance whatever his or her age may be, so long as he or she is unable to maintain himself or herself. The rulings in Burma are not uniform but may in the main be treated as supporting a liberal rather than a narrow interpretation of the term ' child.' In *Thambuswami Pillai* v. *Ma Lone*[9], Sir Charles Fox, J., observed : " I hesitate to adopt the view of Sankaran Nair, J., in *Krishnaswami Ayyar* v. *Chandravadana*[1], without further argument, for it appears to me that the legislature may have intended to make a father liable for the maintenance of his child throughout its life, if owing to some mental or corporeal defect it is unable to maintain itself." The ruling in *Baran Shanta* v. *Ma Chan Tha May*[10], is valuable for the enunciation of the principle that where the child is a minor, the father if he is a man of means cannot be absolved of his liability to maintain the child on the ground that the child is able to earn, since it would be contrary to public policy to encourage child labour even if the parties belong to the labouring classes. Caution exhibits itself in the remarks of Heald and Brown, JJ., in *U Ba Thaung* v. *Ma Aye*[11], that " there is authority for the view that the provisions of section 488 as to children cannot apply after the child has attained the age of majority, but cases undoubtedly do arise where a son or daughter after attaining the age of majority is unable to maintain itself and we should hesitate to lay down as a rigid rule that in no such case could an order of maintenance in favour of a child be enforced as regards a major." A firmer note is discernible in *Ma E Mya* v. *U Ke Ke Gyi*[12], where it was stated " The word 'child' merely expresses a relationship which may exist whether the child is under the age of majority or over the age of majority. A child which has reached majority may for some reason be unable to maintain itself, in which case the parent will under section 488, Criminal Procedure Code be liable to maintain it." The decision in *Ma E Shi* v. *U. San Kai*[13], is the converse of *Baran Shanta's case* and lays down that the capacity of a child to earn will be relevant in considering whether it could get

1. (1913) 25 M.L.J. 349 : I.L.R. 37 Mad. 565.
2. (1913) 25 M.L.J. 355.
3. (1873) 5 N.W.H.C.R. 237.
4. (1925) 49 M.L.J. 335 : I.L.R. 49 Mad. 891 at 896.
5. (1935) I.L.R. 62 Cal. 639.
6. A.I.R. 1933 Lah. 1026.
7. (1922) 65 I.C. 631.
8. (1910) 6 I.C. 960.
9. (1916) 37 I.C. 311.
10. (1924) I.L.R. 2 Rang. 682.
11. (1932) I.L.R. 10 Rang. 194.
12. A.I.R. 1937 Rang. 370.
13. A.I.R. 1939 Rang. 67.

maintenance from the father after attaining majority. The Patna High Court has also construed the term ' child ' liberally in *Mt. Khedani Rajwarin* v. *Lagan Singh*[1]. The Court observed " There is no limit of age placed by section 488 for the maintenance allowance awarded under that section to be paid. As there is no express specification in the Indian law, no limit can at all be placed. The omission to define the age was probably intentional so as to allow the maintenance to continue even throughout the life, if owing to some mental or corporeal defect the person is unable to maintain himself."

These are weighty observations and the considerations favouring a liberal construction of the term ' child ' are many and forceful ; still in view of the conflict of judicial opinion on a matter which is bound to come up before the Courts not infrequently it is to be desired that the legislature sets the matter at rest one way or the other.

NAGINDAS GOKULDAS *v.* BHIMRAO DAMU, I.L.R. (1943) Bom. 117.

This decision deals with the power of a *de facto* guardian of a Hindu minor to bind the latter in respect of a promissory note passed by him on behalf of the minor, the debt being incurred for necessary purposes. It lays down that the minor cannot be bound and recourse cannot be had against his estate for the recovery of the amount due under the note. The guardian in the instant case was the minor's paternal grandmother and the promissory note sued upon was the last of a series, the first of them having been executed by the minor's father.

The scope of a guardian's authority in these matters has been considered from four aspects : (1) whether a guardian can bind the minor only by charging his estate ? (2) even if he can bind the minor otherwise, can that be done only in respect of an *antecedent* liability arising under the personal law of the minor by which he would be bound (3) is it further essential that in such cases the document by which the minor is sought to be bound should be appropriately worded so as to indicate *ex facie* that the obligation is one intended to be discharged out of the minor's estate ? and (4) whether it will make any difference if the guardian is a *de facto* and not a *de jure* guardian.

The first of these questions was practically answered in the negative in *Sudarsana Rao* v. *Dalayya*[2], though incidentally only, and it was there pointed out that the decision of the Privy Council in *Zemindar of Polavaram* v. *Maharajah of Pittapur*[3], cannot be deemed to have disapproved of the rule laid down by a Full Bench of the Madras High Court in *Ramjogayya* v. *Jagannadham*[4], that the decree can be passed against a minor in cases in which the minor's estate would have been liable for the obligation incurred by the guardian, under the personal law to which he is subject. In (1943) 2 M.L.J. N.I.C. at page 29 it was pointed out : " nevertheless it looks from the language (in the *Polavaram Case*), as if the Privy Council approved the view that, if the defendant is a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt, as a rule of law." Three decisions of the Privy Council may be said to have a bearing on the questions propounded. In *Waghela Rajsanji* v. *Shekh Masluddin*[5], Lord Hobhouse remarked : " They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward." In *Inder Chunder Singh* v. *Radha Kishore Ghose*[6], the Judicial Committee observed : " The contention that the mother and widow . . . . had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained." Nearly

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1. (1920) 61 I.C. 64.
2. (1943) 1 M.L.J. 339.
3. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
4. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
5. (1887) I.L.R. 11 Bom. 551 (P.C.).
6. (1892) I.L.R. 19 Cal. 507, 511.

half a century later, in *Zemindar of Polavaram* v. *Maharajah of Pittapur*[1], Sir Shadi Lal said : " They (the High Court) also found that as the defendant was a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt. This finding has not been contested and as the claim for the personal liability of the defendant is negatived the plaintiff is not entitled to recover the money from the ' general assets ' of the defendant." Having regard to the specific mention by the Privy Council int hefirst of these cases that the Indian law on the matter was the *same* as the English law, that the principle laid down was really one of *justice and equity* and that there was *no system of law where a contrary rule prevailed*, it looks as if the Judicial Committee intended to lay it down as an absolute rule that the guardian could not make a covenant in the name of the minor so as to impose a personal liability on him or his general assets. In that view it has been held in some cases that even where there is a legal necessity, if the minor is to be bound, it can be done only by the guardian charging the minor's property, *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[2], *Keshav* v. *Balaji*[3], *Shankar* v. *Nathu*[4]. A number of other cases have permitted a relaxation of the rule on special facts. It has thus been held that where the act of the guardian is but an affirmation or continuation of a pre-existing liability that would have bound the minor under his personal law, the minor cannot impugn it, *Subramania Aiyar* v. *Arumugha Chetty*[5], *Ramjogayya* v. *Jagannadhan*[6], *Satyanarayana* v. *Mallayya*[7], *Bhawal Sahu* v. *Baijnath Pertab Narain Singh*[8], *Annappagauda* v. *Sangidigayppa*[9]. Some decisions have suggested that when there is a legal necessity the guardian may borrow under a bond or note for the first time and lay the minor's estate liable therefor, *Nathuram* v. *Shoma Chhagan*[10], *Tulsidas* v. *Vaghela Raisingji*[11], *Imperial Bank of India* v. *Veerappan*[12]. It has also been held that if a testamentary guardian in continuing a running business left by the testator in accordance with his directions is obliged to borrow for the purposes of such business, the creditors of the business can proceed directly against the assets for liability properly incurred by the guardian, in the latter's right to indemnity in respect of such acts, *Vishwanath* v. *Raghunath*[13]. In regard to these cases recognised as exceptions, the decisions have however suggested that the document under which the liability is incurred should be so drawn up as to exhibit the liability of the estate therefor by the use of appropriate words, see *Bhawal Sahu* v. *Baijnath Pertab Narain Singh*[8], *Keshav* v. *Balaji*[13].

Assuming that the principles indicated constitute a correct assessment of the position, there is still considerable conflict of judicial opinion whether a *de facto* guardian stands on the same footing as a lawful guardian. *Hanooman Prasad's case*[14] has no doubt stated that a *de facto* manager of a minor's estate can charge the estate and borrow if there was legal necessity or benefit. The case was however one where the person managing the minor's estate happened to be his mother, a lawful guardian. Whether the observations of the Judicial Committee in that case are to be understood in that background or divorced from it has itself given rise to different views: see the opinions of the learned Judges in *Tulsidas* v. *Vaghela Raisingji*[11] In *Chennappa* v. *Onkarappa*[15] it has been held that a *de facto* guardian cannot make an acknowledgment as a lawful guardian within the meaning of section 21 of the Limitation Act, though it was recognised that by reason of the decisions, the acts of a *de facto* guardian bind the estate of a minor if done under a compelling necessity. Whether the power so stated will include a power to bind the minor by a covenant entered into in his name is however debatable. In *Arumugham Chetti* v. *Duraisinga*

1. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
2. (1894) I.L.R. 21 Bom. 61.
3. (1932) 34 Bom. L.R. 996.
4. (1932) 34 Bom. L.R. 1001.
5. (1902) I.L.R. 26 Mad. 330.
6. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
7. (1934) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).
8. (1907) I.L.R. 35 Cal. 321.
9. (1906) I.L.R. 26 Bom. 221 (F.B.).
10. (1890) I.L.R. 14 Bom. 562.
11. (1932) I.L.R. 57 Bom. 40 (F.B.).
12. (1934) 67 M.L.J. 573 at 580.
13. (1937) 40 Bom.L.R. 458.
14. (1856) 6 M.I.A. 393.
15. I.L.R. (1940) Mad. 358 (F.B.).

Tevar[1], it was held that persons purporting to act as *de facto* guardians and to incur debts in good faith for the benefit of a minor could not bind the minor's property by their acts if in fact they had no legal status as guardians, see also *Swaminatha Odayar* v. *Natesa Iyer*[2]. In view of the conflicting opinions expressed regarding the guardian's power to bind a Hindu minor on a covenant entered into by him on behalf of the minor and to lay his estate open for realisation of amounts that might become due, a decision of the Judicial Committee explaining the scope of their observations in the *Polavaram case* and the earlier decisions is highly to be desired.

TOTARAM ICHHARAM *v.* DATTU MANGU, I.L.R. (1943) Bom. 138.

This case deals with an important point of law. Order 39, rule 7, Civil Procedure Code, provides that the Court may on the application of any party to a suit make an order for the detention, etc., of any property which is the subject-matter of such suit or as to which any question may arise therein. In the instant case, the question was whether a person who sought leave to sue in *forma pauperis* can, before such leave was given, apply to have a commissioner appointed to take an inventory of property so as to prevent the defendant from making away with it or whether he is bound to wait till his application for leave was disposed of before the request can be granted. The contention urged against the appointment of a commissioner at that stage was that till leave in the pauper application was granted. there was no suit and hence there would be no party to a suit within the meaning of Order 39, rule 7. In *Purna Chandra Chabri* v. *Tara Prasad Maity*[3], in holding that an attachment before judgment could not be made at the instance of a person who had applied for leave to sue as a pauper before his application had been judicially determined in his favour, the learned Judges observed : "Until the Judge has determined whether or not the plaintiff should be permitted to sue as a pauper, there is no suit before the Court ; it is merely an application." In *Skinner* v. *Orde*[4], however, the Privy Council had stated that on the presentation of the petition to sue as a pauper the suit is deemed to have been instituted, and from that it would seem that whether the application is eventually granted or whether the party subsequently pays the necessary court-fee, the suit itself should be considered to have been filed on the presentation of the petition to sue as a pauper. The observation in the Calcutta case did not advert to the view indicated by the Privy Council in *Skinner's case*. As pointed out by Gentle, J., in *Chidambaram* v. *Nataraja Mudaliar*[5] (where the facts were practically the same as in the case under notice), in view of the remarks of the Privy Council in *Skinner's case*, on the presentation of the petition to sue as a pauper the suit should be deemed to have been instituted and as such the parties to the suit will be the persons cited in the copy of the plaint filed along with the petition, and therefore even before the grant of leave in the pauper application it would be competent for the petitioner to apply for the appointment of a commissioner. The conclusion in the case under notice is thus in accord with the observations of the Privy Council and the ruling in the Madras case.

VIRANGAUDA LINGANGAUDA *v.* YELLAPPA SHIDDAPPA, I.L.R. (1943) Bom. 259.

Three rulings of the Privy Council have finally settled that where the rival claimants to the property of a deceased person governed by the Mitakshara law are both atma bandhus, the preference between them falls to be decided by a consideration of the number of degrees by which they are separated from the deceased and not by the principle of spiritual benefit. In *Vedachala* v. *Subramania*[6], where the contest was between the maternal uncle and the father's sister's son's son, in preferring the former, the Privy Council observed : "He (maternal uncle) is

1. (1911) 21 M.L.J. 1077 : I.L.R. 37 Mad. 38.
2. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 879.
3. (1917) 21 C.W.N. 870.
4. (1879) L.R. 6 I.A. 126, 136.
5. (1939) 1 M.L.J. 96 : I.L.R. (1938) Mad. 1060.
6. (1921) 41 M.L.J. 676 : L.R. 48 I.A. 349 : I.L.R. 44 Mad. 753 (P.C.).

undoubtedly nearer in degree to the deceased ; he also offers oblations . . ." In *Jatindranath Roy* v. *Nagendranath Roy*[1], which was a case, not under the Madras school but, under the Benares school of Mitakshara law, in declaring the father's half-sister's son to be the preferential heir as against the mother's brother's son, the Judicial Committee remarked : " Under the Benares school of Hindu law it is now well settled that the primary test in all questions of inheritance is propinquity in blood " . . . . " and the Viramitrodaya brings in the conferring of spiritual benefit as the measure of propinquity where the degree of blood relationship furnishes no certain guide." Finally in *Balasubramanya* v. *Subbayya Thevar*[2], where the rival claimants were the maternal uncle and the father's sister's son (who however was found to be illegitimate) in preferring the former, the Privy Council said : " At first sight it would appear that the question is covered by the direct authority of the Board ; *Jatindranath Roy* v. *Nagendranath Roy*[1]. In that case it was laid down that the test of religious efficacy was applicable between atma bandhus only when the parties were equal in degree." At another place in the same judgment their Lordships said that " it was only when the test of proximity failed that religious efficacy came in." These three rulings make it clear that it is only where the rule of nearness in degree fails that the principle of spiritual benefit could be imported and that the rule is by no means peculiar to any sub-school of the Mitakshara but governs by whatever sub-school the parties are governed: *see* in this connection *Debi Das* v. *Mukat Behari*[3] and *Sahodra* v. *Shri Thakur Beharji Maharaj*[4].

In the instant case, the competing claimants were the mother's brother and the father's sister's son, and the parties were governed by the Bombay sub-school of Mitakshara law. On the principles stated it is clear that the maternal uncle is the nearer heir. A Full Bench decision of the Bombay High Court given in 1925, in *Sakharam Narain* v. *Balakrishna Sadashiv*[5], on identical facts, had however held the other way. The question therefore was whether that decision was to be deemed to have been overruled by the subsequent decision of the Privy Council in *Balasubramanya* v. *Subbayya Thevar*[2]. The Bombay Full Bench decision had proceeded on the view that the method of determining propinquity by calculating the number of degrees from the common ancestor cannot apply to bandhus so effectively as to sagotra sapindas and that though the maternal uncle, taking the common ancestor on the mother's side, may appear one degree nearer than the father's sister's son as taken from the common paternal ancestor, still such method of determining nearness cannot be decisive, where there is not one common ancestor either paternal or maternal for the purpose of determining the relative position of the two bandhus, and that the element of difference between the paternal and the maternal line necessarily comes in casting the preference in favour of the claimant *ex parte paterna*. The argument that the Privy Council decision in *Balasubramanya's case* did not touch the Bombay Full Bench view was rested on the facts that the Full Bench decision had not been noticed by the Privy Council, that the law expounded by the Judicial Committee was the law relating to the Madras school and that the previous decision of the Bombay High Court in *Saguna* v. *Sadhashiv*[6] on which the Full Bench had based its opinion, had come in for express approval by the Privy Council in *Jatindranath Roy* v. *Nagendranath Roy*[1]. It is true that the Bombay Full Bench ruling does not appear to have been cited before their Lordships in *Balasubramanya's case*, but it was criticised and dissented from in the judgment of the High Court which was on appeal before their Lordships. Again, the Privy Council decision was not based on any peculiarity in the Mitakshara law as prevailing in Madras but had merely purported to apply the principles of the Mitakshara and the Viramitrodaya which are leading authorities not merely in southern India, but also in western India. Also, it professed to follow the earlier ruling in *Jatindranath Roy* v.

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1. (1931) 61 M.L.J. 442 : L.R. 58 I.A. 372 : I.L.R. 59 Cal. 576 (P.C.).
2. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).
3. I.L.R. (1943) All. 131.
4. I.L.R. (1943) All. 155.
5. (1925) I.L.R. 49 Bom. 739 (F.B.).
6. (1902) I.L.R. 26 Bom. 710.

Nagendranath Roy[1], a case from Bengal where the parties were governed by the Benares school of the Mitakshara law. Nor did the decision rest on any special texts of the Smriti Chandrika or the Sarasvati Vilasa which are authoritative in the Madras school. Nor was there any special text of the Vyavahara Mayukha propounding a contrary rule. Nor could the approval of *Saguna* v. *Sadashiv*[2] in *Jatindra's case* have any significance in view of the fact that in those cases the contestants were in the same degree whereas in the Bombay Full Bench case and *Balasubramanya's case* they were in unequal degree from the decedent. Nor had the Bombay Full Bench case proceeded on any "intelligible underlying principle"; for it had accepted proximity of relationship as the governing principle and not spiritual benefit and *Vedachala's case* had been relied on. The afore-mentioned reasons make it clear that though not specifically overruled the decision of the Full Bench in *Sakharam Narain* v. *Balakrishna Sadashiv*[3] cannot be deemed to be good law after the Privy Council decision in *Balasubramanya's case*.

GORDHANDAS MANGALDAS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY, I.L.R. (1943) Bom. 245.

This decision deals with a point of income-tax law. Section 25-A (1) of the Income-tax Act before it was amended in 1939 provided: "Where at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of the family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among its members in definite portions . . . . he shall record an order to that effect." In the amended sub-section (1) the words "that a separation of the members of the family has taken place and" are omitted, so that the Income-tax Officer instead of having to be satisfied of two things, namely, that a separation of the members had taken place and that the joint family property has been partitioned in definite portions has now to be satisfied of one thing only, namely, that the joint family property has been partitioned among its members in definite portions. The question is whether the Income-tax Officer should be satisfied that the properties have been "physically divided" or merely that there has been a division in interest. The cases on the subject are altogether conflicting. A Full Bench decision of the Lahore High Court, an *obiter dictum* of a learned Judge of the Allahabad High Court, and a ruling of the Judicial Commissioners' Court of Nagpur have taken the view that a physical division is not needed and all that the section requires is only a separation in interest among the members of the erstwhile joint family. As against these authorities, a Division Bench of the Lahore High Court and the Patna, Bombay and Madras High Courts have taken a different view. In *Sir Sunder Singh Majithia* v. *Commissioner of Income-tax, U. P. & C. P.*[4], the object and scope of the section before its amendment was explained by the Privy Council as follows: "Section 25-A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision—an important principle of the Act—contained in section 14 (1): 'The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.' Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may

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1. (1931) 61 M.L.J. 442: L.R. 58 I.A. 372: I.L.R. 59 Cal. 576 (P.C.).
2. (1902) I.L.R. 26 Bom. 710.
3. (1925) I.L.R. 49 Bom. 739 (F.B.).
4. (1942) 2 M.L.J. 761: I.L.R. (1943) All. 69 (P.C.).

take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family—in effect as tenants-in-common. Section 25-A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding the members jointly and severally liable for the total tax. If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue—that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year." That section 25-A controls section 14 (1) if the property has been partitioned in definite portions but not where the family is merely separated in interest coupled with the reference to the distinction between the Mitakshara family and the Dayabhaga family constitute a definite pointer that the partition in " definite portions " contemplated by section 25-A is really a " physical division " of the family property and not a separation in status merely. It is also to be noticed that the retention of the second portion and the omission of the first requirement (namely, that a separation of the members of the family has taken place) in section 25-A by the amendment of 1939 emphasises and is only consistent with the view that it is a physical division of the joint property into definite portions that is contemplated. Again the amended section applies to both Dayabhaga and Mitakshara equally and the section will have no effect at all on families under the Dayabhaga system unless the partition is held to involve a physical division into definite portions. As pointed out by Addison and Sale, JJ., in *Saligram Ramlal* v. *Commissioner of Income-tax, Punjab*[1], even under the unamended section if actual partition had not been contemplated the first requirement of the section would have sufficed and the second would be otiose. *Lachiram Baldeodas* v. *Commissioner of Income-tax, Bihar*[2], holds that a mere notional disruption will not do. The Full Bench decision of the Lahore High Court in *Sher Singh Nathu Ram* v. *Commissioner of Income-tax, Punjab*[3], does not refer to the prior ruling *contra* of the same Court, delivered just about four months earlier. It is difficult to agree with the view of the Full Bench that a partition may involve three stages : (1) disruption without ascertainment of shares as where they are disputed ; (2) disruption with the shares ascertained as where the parties are agreed ; and (3) division by metes and bounds. The conclusion arrived at on that view that what section 25-A requires to be proved may be either the second or the third element has no warrant, for, there can be no such thing as disruption without ascertainment of shares carrying any special status. The distinction between stage 1 and stage 2 is really one concerning the machinery of ascertainment, whether it is to be by litigation or by agreement. Above all, after the definite indication afforded by the ruling of the Privy Council in *Sir Sundar Singh Majithia's case*, the view of the Lahore Full Bench and the *obiter dictum* of Niamatulla, J., in *Biradhmal Lodha* v. *Commissioner of Income-tax*[4], as well as the decision in *Sir Bisesardas Daga and others*, In re[5], which merely follows that *obiter dictum* cannot be regarded as sound. The conclusion reached in the instant case that section 25-A as amended contemplates a physical division of the joint family property in definite portions is in accordance with the Privy Council ruling and has also commended itself to a Bench of the Madras High Court in *Gurumurthi Setti* v. *The Commissioner of Income-tax, Madras*[6].

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1. (1934) 2 I.T.R. 448 : A.I.R. 1934 Lah. 942.
2. (1936) 4 I.T.R. 279.
3. (1934) 2 I.T.R. 479 : A.I.R. 1925 Lah. 81 (F.B.).
4. (1933) 2 I.T.R. 164 : I.L.R. 56 All. 504.
5. (1935) 4 I.T.R. 66.
6. (1944) 1 M.L.J. 197.

RAMU *v.* MURLI DAS, I.L.R. (1943) All. 23.

Section 133, Criminal Procedure Code, authorises a magistrate to pass a conditional order for the removal of a public nuisance. Such an order may emanate either on the receipt of a police report or other information and on the taking of such further evidence as the magistrate may think fit. Interesting questions have arisen whether an informant placing information before a magistrate regarding an alleged public nuisance has any *locus standi* in the matter to be heard and whether the magistrate should always pass an order under the section. From very early times it has been recognised that proceedings under the section are not intended to settle private disputes between members of the public, that the Courts should be on guard to see that the section is not utilised as a substitute for litigation in Civil Courts and that a magistrate in case he decides to pass an order under the section will be acting *suo motu* in the matter. Thus In the matter of *the petition of Issur Chunder Nath*[1], the Calcutta High Court laid down that where a magistrate in a proceeding under the section satisfies himself that there is no necessity for proceeding further under the section he can let the matter drop. In *Farzand Ali* v. *Hakim Ali*[2], it was pointed out by the Allahabad High Court that it is certainly expedient that in all proceedings initiated under section 133 the magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and that the complainant has no *locus standi* in the matter once he has performed what was perhaps his duty as a goo citizen in calling the attention of the magistrate to the existence of the nuisance. The scope of section 133 was still further clarified in *Sibte Husain* v. *Emperor*[3]. It was there explained that no private person has a right to insist that a magistrate shall pass orders under section 133; that whether such orders should be passed is altogether a matter for the discretion of the magistrate; that if he does not choose to interfere the party aggrieved has his normal remedy in the Civil Court and that the provision that an inquiry should be held is not intended to enable any person complaining of a nuisance to compel the magistrate to hold an inquiry but only to protect the rights of the person against whom it is proposed to pass an order under section 133. The view taken in the case under notice that whenever the magistrate acts under section 133 he in effect acts *suo motu* and that the person who laid the information has no rights in the matter is thus in accord both with the object of the section and the precedents on the subject.

DEBI DAS *v.* MUKAT BEHARI LAL, I.L.R. (1943) All. 131; SAHODRA *v.* SHRI THAKUR BEHARIJI MAHARAJ, I.L.R. (1943) All. 155.

These are decisions rendered within about a week of each other by two different benches of the Allahabad High Court—Dar and Plowden, JJ., in the one case and Bajpai and Dar, JJ., in the other case—holding that in a competition between bandhus of the same class and in equal degree, the one claiming from the nearer line will be preferred to the one who is claiming from a remoter line. The conclusion may be somewhat commonplace but the reservation made is obviously one of great interest and may have to be finally solved by the Judicial Committee. The reservation was on the question whether a remoter bandhu in a nearer line should be preferred to a nearer bandhu in the remoter line. In the first of the cases the contest was between the sister's son's son and the paternal uncle's son's daughter's son and the former was preferred. In the later case the rival claimants were the sister's daughter's son and the paternal uncle's daughter's son and the former was held to be the preferential heir.

Bandhu succession forms an obscure chapter in Hindu law. The guidance afforded by the shastras is slender; the texts of law are scanty and remote; the field for deduction and speculation is rather wide. The result has been that rules

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1. (1882) I.L.R. 8 Cal. 883.
2. (1914) I.L.R. 37 All. 26.
3. A.I.R. 1937 All. 785.

have come to be recognised by some High Courts, with other High Courts dissenting (*e.g.*, Dr. Sarvadhikari's line theory accepted in Allahabad and rejected in Madras) that have not conduced to either simplicity of or clarity in understanding the law on the subject. During the last seventy-five years however, the Judicial Committee has made several pronouncements which have settled some of the controversies which had gathered round this branch of Hindu law. It is thus now settled that atma bandhus take before pitru bandhus and that the latter are to be preferred to the matru bandhus. It is also equally well settled that, where the contestants belong to the same class of bandhus, nearness in degree determines priority between them. It is also fairly clear that, where the claimants are in the same class and degree, spiritual benefit may guide preference. The rulings in *Vedachala* v. *Subramania*[1], *Jatindranath Ray* v. *Nagendranath Ray*[2] and *Balasubramanya* v. *Subbayya*[3] are now conclusive on these matters.

There are however other points arising out of these decisions which still remain to be finally elucidated. One such point is as regards the manner in which nearness in degree is to be ascertained. Is it to be done by a mere counting of the links separating the deceased from the respective claimants? This is no doubt the method of calculation adopted by the Indian Succession Act and in the Canon law. But does it operate in Hindu law? Or is it that in the first instance the relative proximity of the lines in which the contesting claimants are situated should be ascertained and that it is only where the lines are equally remote that the degree in which each claimant stands with reference to his common ancestor would become relevant for determining preference? In *Vedachala* v. *Subramania*[1], where the contest was between the maternal uncle and the father's sister's son's son, the Privy Council remarked: "What is the place of the mother's brother among the atma bandhus? He is not specifically named; his sons are. He is *unquestionably the nearest sapinda.*" To read the italicised part literally will be impermissible, as to do so may lead to strange results. For one thing it would suggest that the maternal uncle is nearer than even the maternal grandfather, or one's son's daughter's son or sister's son, a position that has not so far received any countenance. Also the later observations of the Privy Council in the same para. would seem to indicate that in the context the remark in question fell to be made only *vis a vis* the other claimant in the case, the father's sister's son's son, who certainly was equal in line with the maternal uncle from the propositus though unequally placed as regards degree. Whether however proximity in degree is to be reckoned by the number of links separating the respective claimants from the decedent irrespective of any reference to the lines in which they are posited is a matter about which there is no lead in the judgment. In the particular case, in whatever way calculated, the maternal uncle will be nearer in degree than the father's sister's son's son. Computing from the deceased in a reel he is in the fourth degree, there being two links intermediate between him and the propositus; worked out that way the other claimant will be in the sixth degree, there being four links intervening between him and the deceased. Making the calculations with reference to their respective lines, then also the result will be the same; the respective claimants will be in equal line, one being in the line of the maternal grandfather and the other in that of the paternal grandfather; from the common ancestor however the maternal uncle is in the second degree whereas the father's sister's son's son is in the fourth degree. In *Jatindranath Ray* v. *Nagendranath Ray*[2], where the contest was between the father's half-sister's son and the mother's sister's son, it was observed: "It is not disputed that the opposing parties are in equal degrees of propinquity to the propositus." This is quite consistent with nearness being ascertained either absolutely by counting from the deceased or by advertence to the lines in which the respective claimants are situated in the first instance, and the proximity of degree from the common

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1. (1921) 41 M.L.J. 676 : L.R. 48 I.A. 349 : I.L.R. 59 Cal. 576 (P.C.). I.L.R. 44 Mad. 753 (P.C.).
2. (1931) 61 M.L.J. 442 ; L.R. 58 I.A. 372 : I.L.R. (1938) Mad. 551 (P.C.).
3. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 :

ancestor being invoked to decide preference thereafter, the lines themselves being equal. Likewise in *Balasubramanya* v. *Subbayya*[1], where the rival claimants were the maternal uncle and the father's sister's son, the Privy Council observed : "As between claimants 2 and 3 Subbayya as nearer in degree to the last male holder is entitled to succeed to the estate." This remark also does not carry the matter any further, for the result will be the same whether proximity of degree was judged with reference to the propositus himself directly or after reference to the nearness of the line. The decision of the Judicial Committee in *Ramachandra Martand* v. *Vinayek Venkatesh Kothekar*[2], that for purposes of heritability sapinda relationship will have to be taken in the same sense in which it is used and understood in regard to the marriage rules, would afford a pointer that proximity of degree will have to be ascertained by a reference in the first instance to the common ancestor and his line and not by ignoring that factor. The approach to the question in the instant cases that in determining the question of equality or otherwise of the degree it is the position from the common ancestor of each claimant that should be adverted to and not the position with reference to the propositus himself directly thus seems to constitute a correct appreciation of the position.

The question however remains whether relative nearness to the common ancestor is to operate as a ground of preference only where the lines of the claimants are equal or whether if a claimant is in a nearer line that will in every case give him the preference, however close the other claimant may be to the common ancestor who himself is remoter. On this point, there is no unanimity of judicial opinion. In *Muthusami* v. *Muthukumarasami*[3], Muttuswami Ayyar, J., observed : "Though sons born in the family are all gotrajas, yet the Mitakshara regulates the succession when there is competition between them with reference to the nearness or remoteness of propinquity, as, for instance, between a brother and a paternal uncle's son. It is not clear why this analogy should be ignored in the case of daughters born in the family and why the father's sister and the grandfather's sister should be treated as related to the propositus in the same degree of affinity. Nor is it reasonable to regard one's own sister's son and one's grandfather's sister's son as related in the same degree." This would suggest that the nearer line should be preferred to the more remote in bandhu succession as in the case of gotraja succession. No warrant however is afforded for the argument that the nearer line should always prevail over the remoter without any qualification. A number of decisions in Madras and a ruling of the Bombay High Court have expressed themselves in favour of such a rule. Thus in *Baluswami Pandithar* v. *Narayana Rau*[4], the principle was applied preferring the sister's son's son to the maternal uncle's son. The former is in the fourth degree from the common ancestor and the latter is in the third degree ; yet the former was held to be the preferential heir because he belonged to a nearer line. In *Krishna Ayyangar* v. *Venkatarama Ayyangar*[5], the father's sister's daughter's son was preferred to the father's father's sister's son. This is as it should be, for the former is an atma bandhu and the latter is only a pitru bandhu. The learned Judges however emphasised the fact that the defendant was of "*the nearer line and therefore*" entitled to inherit. In *Kalimuthu Pillai* v. *Ammamuthu Pillai*[6], in preferring the daughter's daughter's son to the sister's son stress was laid on the principle that in each class of bandhus "the nearer in line excludes the more remote." The ruling in *Dattatraya Bhimrao* v. *Gangabai*[7] has also taken a similar view. In *Sham Dei* v. *Birbhadra Prasad*[8], the rival claimants were the sister's daughter's son and the paternal grandfather's daughter's son's son. The latter was preferred. The conclusion seems to have no legal warrant and is difficult to follow. Both the

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1. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).
2. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290 : I.L.R. 42 Cal. 384 (P.C.).
3. (1892) 2 M.L.J. 296 : I.L.R. 16 Mad. 23, 29.
4. (1887) 7 M.L.J. 207 : I.L.R. 20 Mad. 342.
5. (1905) I.L.R. 29 Mad. 115.
6. (1934) 67 M.L.J. 503 : I.L.R. 58 Mad. 238.
7. (1921) I.L.R. 46 Bom. 541.
8. (1921) I.L.R. 43 All. 463.

claimants were atma bandhus ; the sister's daughter's son admittedly belonged to a nearer line ; reckoning nearness from the common ancestor he is in the fourth degree the other claimant not being nearer ; even computing proximity by looking to the number of links between the claimants and the deceased there are three links only between the sister's daughter's son and the deceased while there are four in the case of the other claimant. So on any reading of the test of proximity the result reached in the case seems to be unsupportable.

Perhaps the most formidable criticism against the view that every heritable bandhu belonging to a nearer line should be preferred to one in a remoter line however close the latter may be to the common ancestor is to be found in the judgment in *Umashankar Prasad Parasari* v. *Mt. Nageswari Koer*[1], where by a majority opinion of three judges to two, it was held that as between the maternal uncle and the sister's daughter's son the former would be the preferential heir. On a rigorous application of the rule that the nearer line should be preferred, the conclusion should have been the other way. In the course of his judgment one of the majority Judges, Mullick, J., observed : " But then it is said that the rule of the Mitakshara is that the nearer line excludes the more remote and therefore the line of the father of which the plaintiff is a member must be exhausted before the line of the maternal grandfather can come in. Now this rule is not based on any text. It is derived from the order of succession as given in the Mitakshara relating to certain named agnates, but even in that connection the rule is not of general and universal application. In the earlier decisions in Upper India the limit was placed . . . at the seventh lineal descendant ; according to later decisions in Madras it was fixed at the second degree ; while their Lordships of the Privy Council have now definitely held that the limit of collateral descent is three degrees in each line . . . . If therefore the rule is limited in application with regard to agnates I see no reason why it should be applied without restraint and restriction in the case of cognates." No doubt this Patna decision is earlier than the Privy Council rulings in *Vedachala's case* and other subsequent decisions which have established that among rival claimants from the same class of bandhus nearness in degree to the propositus will determine preference and that so long as that principle can give a clear lead there is no room for invoking the principle of spiritual benefit or any other rule. The difficulty really arises in the application of the degree rule, whether it is to operate in all cases irrespective of every other consideration and how it is to be correlated to the rule of preference of the nearer line. In the circumstances it will be welcome if the Judicial Committee can clarify the position and impart certainty in the law to be applied.

EMPEROR *v.* NAROTAM DAS, I.L.R. (1943) All. 186.

In this case the Allahabad High Court observed : " It is a matter of opinion whether a Court should or should not take notice of gratuitously insulting remarks contained in an application for adjournment and I am by no means satisfied that it is wise to press the principle of taking no notice too far." With great respect it may be submitted that except where the insult is deliberately intended or calculatedly made a Court should decline to take notice of improper remarks, which more often than not are made as the result of petulance, foolishness or thoughtlessness. In the case in question in an application requesting postponement of trial to enable the applicant to move for a transfer of the case to some other Court, there was a statement that the applicant was making the application because the Court had for some unknown reason become hostile to him. It is true that the allegation was obviously unnecessary in the motion for adjournment. To infer therefrom however an intention to insult the Court does not seem to be warranted. In *Queen-Empress* v. *Abdullah Khan*[2], where, in an application for transfer of a case, certain objectionable allegations had been made against the trying magistrate, Burkitt, J., reversing the

1. (1918) 3 P.L.J. 663 : 48 I.C. 625 (F.B.). 2. (1898) 18 A.W.N. 145.

decision of the Court below held that no intention to insult the Court should be inferred from the allegations, their ostensible object being just to procure a transfer of the case. Curiously enough the application for transfer was made to the trying magistrate himself who however had no power to order the transfer and it might very well have been argued that the presentation of the application with the objectionable remarks to the magistrate had been made only with a view to insult him; such a contention did not however appeal to Burkitt, J. In *Emperor* v. *Murli Dhar*[1], as in the instant case, in an application for adjournment of the trial with a view to apply for a transfer of the case, the accused inserted the allegation that the magistrate was friendly with the complainants and therefore they had apprehension that they would not get a fair trial before him. Obviously the allegation was entirely unnecessary in the application for adjournment; nevertheless Piggot, J., refused to read it as a gratuitous insult addressed to the Court. In reversing the Sessions Judge, the learned Judge remarked: "The question is whether it follows from the wording of the petition that the intention of the persons presenting the same was to offer insult to the presiding officer of the Court" and held that the allegation did not embody any such intention. As pointed out by Moti Sagar, J., in *Parshotam Lal* v. *Crown*[2], the chief ingredient of the offence contemplated by section 228, Indian Penal Code, is the intention of the offender and the question is not whether a judicial officer felt insulted but whether an insult was actually offered and intended. The learned Judge added that "a judicial officer is no doubt fully entitled to maintain the dignity of the Court but he should not be too sensitive and too ready to take offence where none is intended." In *Salig Ram* v. *Emperor*[3], in an application for adjournment by an accused to enable him to make an application to the High Court under section 526, Criminal Procedure Code, he stated: "The applicant notices with regret that the Court is completely in the hands of the prosecution and is unable to show any mercy, favour or kindness to the innocent accused person. The applicant has completely lost all faith. The applicant apprehends that the Hon'ble Court is unable to administer justice in this case impartially". The applicant was convicted under section 228, Indian Penal Code. On the application for transfer of the case coming up before him, Iqbal Ahmed, J., observed *apropos* of the allegations in the application for adjournment: "I must observe that the learned Judge would have shown judicial balance by not taking notice of the passages . . . . and by not taking proceedings under section 228, Indian Penal Code." Whether in any case the allegations in question were made with a view to insult will no doubt remain essentially a question of fact; but to state that it may not be wise to press the principle of taking no notice too far seems to indicate an outlook more rigid than necessary.

PATRU LAL *v.* PARBHAWATI KUAR, I.L.R. (1943) All. 205.

It is observed *inter alia* in this case that "the separation of the coparceners that form a joint Hindu family can only be brought about by individual volition" and that "it is only a member of a joint Hindu family who can separate and neither a Court nor a third party can separate him against his wishes." It is submitted that unless qualified, the statement as a proposition of law would be inaccurate. It is undisputed law that a person can sometimes be severed from the joint family of which he is a member independently of his wishes, as for instance, by the father or paternal grandfather imposing a partition in the family. It is also equally indisputable that irrespective of one's actual wishes, one would by operation of law altogether stand severed from the coparcenary of which he was a unit in case he became a convert to an alien faith like Christianity or Muhammadanism, or if he contracted a marriage under the Special Marriage Act, 1872, as amended in 1923. It is no doubt true that originally partition was held to result from an intention to separate only. It was the right of the coparcener to call for a partition if he was so

1. (1916) I.L.R. 38 All. 284.
2. A.I.R. 1925 Lah. 210.
3. A.I.R. 1937 All. 171.

minded. By making a unilateral declaration of an unequivocal intention to become divided in *presenti* from the other members of the family, a severance in status so far as the declarant was concerned could be achieved. Should such intention be actual, that is factually exist, or can it be constructive? It is here that judicial decisions re-acting to the remorseless logic of the law have made inroads into the pristine doctrine and recognised a constructive intention to separate under certain circumstances, such as in the case of conversion of the Hindu coparcener to a foreign faith.

In certain other cases severance of status as a coparcener on foot of a constructive intention seems to be suggested though not in terms so stated. It has been held that the attachment of a coparcener's share in execution by a creditor arrests the operation of survivorship against such share in case of the coparcener's death (see *Suraj Bansi* v. *Sheo Pershad*[1]) and causes a severance (see *Madho Pershad* v. *Mehrban*[2]). It is also held that when the estate of a coparcener has vested in the Official Assignee or Receiver on his insolvency that estate would continue after his death and would not be defeated by survivorship, *Fakirchand* v. *Motichand*[3] and *Gori Shankar* v. *Official Receiver*[4]. If attachment by Court in execution or vesting in the Assignee on insolvency of the coparcener has the effect of withdrawing the coparcener's share from the range of survivorship at his death, is it unreasonable to construe it as being tantamount to a severance in status of the coparcener concerned so as at any rate to prevent the other members of the family from having any rights in respect of his share or, *vice versa*?

Another point of interest about the case under notice is the rejection of the contention that a sale of the entire interest of the coparcener in the family properties would operate as a severance in status so far as he is concerned. The conclusion is no doubt in accord with the view generally taken by the Courts on this question, see *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[5], *Subba Rao* v. *Ananatanarayana Ayyar*[6], *Nanjayya* v. *Shanmugha*[7], *Maharajah of Bobbili* v. *Venkataramanjulu*[8], *Kandasami Udayan* v. *Velayudha Udayan*[9], *Jagannatha Rao* v. *Ramanna*[10], *Ramasubbaraya Sastri* v. *Venkata Appalanarasimharaju*[11] and *Gurulingappa* v. *Nandappa*[12]. It may however be pointed out that a conclusion the other way would be more in consonance with modern trends in joint family law. Alienation by a coparcener of his share is not contemplated by the texts of Hindu law. A coparcener has in fact no share to speak of till he calls for partition, *Appovier* v. *Ramasubbier*[13]. The position came to be altered when recognition was accorded on grounds of equity to the rights of a purchaser for value from a coparcener in Madras and Bombay of what would be his share on a partition and to attachment in execution of a coparcener's share and sale thereon as passing a good title to the purchaser, *Suraj Bansi* v. *Sheo Pershad*[1]. The latter case itself recognised that "there can be little doubt that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family." Nevertheless it was considered paramount to protect the rights of purchasers from coparceners. The first plunge being made, decisions had, by way of working out the rights of the purchaser, to hold logically that where a coparcener's share stood alienated the alienee would become entitled to "the share" which the alienor would have got had a partition been effected immediately before the sale, *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[5]. It is, as if in effect the sale operated as a partition at the time, *Hardi Narain Sahu* v. *Ruder Perkash Misser*[14]. If the alienee's interest is fixed with reference to the date of the alienation and if subsequent happenings in the family will leave that interest unaffected

1. (1878) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
2. (1891) L.R. 17 I.A. 194 : I.L.R. 18 Cal. 157 (P.C.).
3. (1883) I.L.R. 7 Bom. 438.
4. (1932) I.L.R. 13 Lah. 464.
5. (1902) I.L.R. 25 Mad. 690, 717 (F.B.).
6. (1912) 23 M.L.J. 64.
7. (1914) 26 M.L.J. 576: I.L.R. 38 Mad. 684.
8. (1914) 27 M.L.J. 409, 413: I.L.R. 39 Mad. 265.
9. (1926) 51 M.L.J. 99, 104.
10. (1937) 2 M.L.J. 386.
11. (1940) 2 M.L.J. 1021.
12. (1896) I.L.R. 21 Bom. 797, 802.
13. (1866) 11 M.I.A. 89 (P.C.).
14. (1883) L.R. 11 I.A. 26 : I.L.R. 10 Cal. 626, 636 (P.C.).

and if the attachment of a coparcener's interest in execution takes it beyond the reach of survivorship should the coparcener die, does not the inference become inevitable that on alienation of his share by a coparcener there is a severance of the alienor from the joint family? According to Sadasiva Ayyar, J., in *Soundararajan* v. *Saravana Pillai*[1], where a coparcener sells away his share in all the coparcenary properties without exception he ceases to be a member of the family and a division in status takes place. If an unequivocally expressed intention to create a divided status effects division, the alienation of his interest by a coparcener in all the joint family properties in favour of a stranger seems to be almost conclusive evidence of such an intention to break himself off from the joint status completely, see also *Chinnu Pillai* v. *Kalimuthu Chetti*[2] and *Lakshmi Achi* v. *Narayanaswami Naicker*[3]. This reasoning receives support from certain observations made by the Judicial Committee in *Ram Chunder Dutt* v. *Chander Coomar Mundul*[4], where it was said: "It is true that the status of the family as a joint Hindu family was not continuing. The alienation of the shares of two members of that family determined that status and substituted the status of co-sharers or joint owners whose rights as is shown by Lord Westbury in the case of *Appovier* v. *Ramasubbier*[5] are in many important respects distinguishable from those of a joint and undivided family." The arguments against construing an alienation of even the entire share of the coparcener as a severance in status of the alienor are: (*i*) alienation is not tantamount to the expression of an intention to divide, *Jagannadha Rao* v. *Ramanna*[6]; (*ii*) the purchaser gets only an equity and is not substituted for the alienor, *Gurulingappa* v. *Nandappa*[7]; and (*iii*) severance can only be by a mode known to and recognised by Hindu law, *Lakshmanan Chettiar* v. *Srinivasa Iyengar*[8]. The first argument can now have little force. As indicated *supra* both decisions and statute have recognised that intention to sever may be constructive. If alienation of a coparcener's interest is destructive of the fundamental theory of a joint family under the Mitakshara law, he who deliberately alienates his share cannot but be deemed thereby to detach himself from the family. Again there should be reciprocity of rights among the members of the family *inter se*. To alienate taking benefit thereunder and yet continue as a coparcener will be to give a weightage to or confer a premium at law on one who has rebelled against the integrity of the joint family. Nor can it be sound answer to say that if the other members of the family are not prepared to have the alienor with them in the family the remedy lies in their hands, namely, to become separated from him. The second of the arguments also is scarcely formidable. The purchaser's right though referred to as an "equity" is in effect a right available to him to sue for a general partition with the share being fixed as on the date of the alienation in his favour. The last argument overlooks the fact that severance in modes not contemplated by Hindu law has now come to be recognised having regard to the exigencies of the case, as in the case of conversion. Having regard to the importance of the question it is desirable that the matter is finally set at rest by an authoritative pronouncement.

PARAS RAM SINGH *v.* RAJA MOHAN MANUCHA, (1944) 1 M.L.J. 282 (P.C.).

This decision of the Judicial Committee affirming the judgment of the Allahabad High Court deals with interesting points relating to a mortgage by deposit of title deeds made at Delhi, a place to which the provisions of the Transfer of Property Act do not apply. The decision no doubt turned mainly upon the findings of fact in the case but is not without interest as recalling certain principles relating to equitable mortgages. Along with a promissory note, the title deed relating to a

1. (1916) 30 M.L.J. 592.
2. (1910) 21 M.L.J. 246: I.L.R. 35 Mad. 47, 59 (F.B.).
3. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188.
4. (1869) 13 M.I.A. 181, 198 (P.C.).
5. (1866) 11 M.I.A. 89 (P.C.).
6. (1937) 2 M.L.J. 386.
7. (1896) I.L.R. 21 Bom. 79.
8. (1936) 71 M.L.J. 707: I.L.R. (1937) Mad. 203.

certain property had been handed over in pursuance of an understanding between the parties, to the creditor's brother-in-law who was acting as his agent in the matter, the promissory note and the title deed being subsequently sent on to the creditor by the agent with a covering letter mentioning that the title deed had been handed over as "additional and collateral security" for the promissory note. That a mortgage by deposit of title deeds could be validly created in Delhi was not disputed. Whether the title deed was deposited with the intention to create a security was a point argued resulting in the finding that the deposit was made with intention to create a security. Their Lordships also held that the letter written to the creditor by his agent at Delhi, his brother-in-law, could not be regarded as itself constituting the agreement between the lender and the borrower and so no question of the letter requiring registration for its being admissible in evidence could arise. In *Shaw* v. *Foster*[1], Lord Cairns observed that it was a well-established rule of equity that a deposit of a document of title without more would create a charge, but if the deposit was accompanied with a written charge the terms of the latter will rule. In *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee*[2], the Privy Council laid down that when the bargain is a written bargain, it alone must determine the scope of the security. Applying these principles, Lord Carson propounded in *Subramanian* v. *Lutchman*[3] the test: "*Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?* Amplifying this statement, it was stated by the Privy Council, in *Sundaracharier* v. *Narayana Aiyar*[4] : "While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within section 17 of the Registration Act, unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section *unless on its face it embodies such terms* and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties." Thus it is only where the written bargain is tacitly considered by the parties themselves as the only repositary and evidence of the agreement that registration will be needed and if the note is only a recital of an already completed transaction it does not require registration. On the finding in the instant case that the letter written by the creditor's brother-in-law to him cannot be regarded as itself constituting or embodying the agreement between the borrower and the lender, it follows in accordance with the authorities set out *supra* that no question of need for its registration can possibly arise.

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1. (1872) 5 H.L. 321, 340.
2. (1916) 31 M.L.J. 155 : L.R. 43 I.A. 122 : I.L.R. 43 Cal. 895 (P.C.).
3. (1922) 44 M.L.J. 602 : L.R. 50 I.A. 77 : I.L.R. 50 Cal. 338 (P.C.).
4. (1931) 60 M.L.J. 506 : L.R 58 I.A. 68 ; I.L.R. 54 Mad. 257 (P.C.).

KING EMPEROR v. BANOMALI MAHARANA, (1943) I.L.R. 22 Pat. 48.

An interesting point of criminal law was decided in this case which holds that the legislature in framing section 153-A, Indian Penal Code never contemplated that it should be used with reference to particular small groups of people and that the "classes" contemplated under the section must be not only "clearly defined and separable but also numerous." Section 153-A makes it an offence to promote or attempt to promote "feelings of enmity or hatred between different classes of His Majesty's subjects". The word "classes" in section 153-A has not been defined anywhere. In *Vishambar Dayal Tripathi* v. *Emperor*,[1] it was pointed out that any definite and ascertainable class will come within the section though the classes may not be divided on any racial or religious tests. On this test, it has been held that "capitalists" are not a class within the meaning of the section, *ibid.*, see also *Nepal Chandra Bhattacharya* v. *Emperor*,[2] *Maniben Kara* v. *Emperor*.[3] Likewise it has been held that a joint stock company is not a "class" of His Majesty's subjects for purposes of section 153-A or its shareholders as distinct from the labourers or employees, *Thakin Lay Maung* v. *The King*[4]. On the other hand the view has been expressed that the police as a whole may be deemed to be a "class," *Zamindar Newspaper, In the matter of*.[5] Similarly for the purposes of section 4 (1) (*d*) of the Press (Emergency Powers) Act, 1931, the "rich" more particularly described in the pamphlet forming the subject matter of complaint in the particular case, as "zemindars, mill-owners and land-owners", were held to form a sufficiently ascertained "class" for the purposes of the section, *Ramalingayya* v. *Emperor*.[6] In coming to that conclusion the Madras High Court followed a ruling of the Allahabad High Court in *Ram Saran Das Johri* v. *Emperor*,[7] where it had been held that the reference in a pamphlet to the "rich persons" as zamindars, bankers and petty shop-keepers, as contrasted with kisans was sufficiently well-defined for the purpose of section 16 of the Press (Emergency Powers) Act, 1931, as amended by the Criminal Law Amendment Act, 1932. It may, with respect, be pointed out that to interpret the word "class" in section 153-A of the Penal Code so as to take in the rich merely because the latter term was more particularly or fully described as comprising the zemindars, bankers and land-owners is to give the term a liberal instead of a strict interpretation, which is inconsistent with the principle that penal statutes should be construed strictly. It may also be noted that a different interpretation has been favoured in certain other decisions. Thus in *Kamal Sircar* v. *Emperor*[8], Biswas, J., held that the word "class" meant only a definitely ascertainable body of individuals having clearly defined and non-variable characteristics by which it may be distinguished from any other group, and that "capitalists" as such any more than literates or illiterates or the rich or the poor will not be a "class" within the meaning of section 4 (1) (*d*) of the Press (Emergency Powers) Act. Similarly in *Badri Narain* v. *Chief Secretary to the Government of Behar*,[9] it was held that the words "masters or exploiters" were too wide to denote a definite or ascertainable class.

The precise scope of the term "classes" in section 153-A, Penal Code has been examined in two decisions of the Bombay High Court, *Maniben Kara* v. *Emperor*[3] and *Vasudev Phadke* v. *Emperor*[10]. In the first of these cases it is pointed out that a "class" within the meaning of section 153-A should be characterised by three elements: (*i*) it should be well-defined and ascertained; (*ii*) there should be an element of permanence or stability about it; and (*iii*) it must be sufficiently widespread and numerous. In the later case, the Bombay High

1. (1940) 190 I.C. 887.
2. I.L.R. (1939) 1 Cal. 299.
3. (1932) I.L.R. 57 Bom. 253.
4. 1939 Rang. L.R. 239.
5. A.I.R. 1934 Lah. 219.
6. (1936) 71 M.L.J. 357: I.L.R. (1937) Mad. 141.
7. A.I.R. 1934 All. 717.
8. I.L.R. (1938) 1 Cal. 455.
9. A.I.R. 1941 Pat. 132.
10. (1940) 42 Bom.L.R. 861: A.I.R. 1940 Bom. 379.

Court went further. Beaumont, C.J., observed: "I think to bring any body of persons within the description of a "class" of His Majesty's subjects within the meaning of section 153-A, the body of persons must possess a certain degree of importance numerically. One cannot say that every group of persons is properly designated a class of His Majesty's subjects. For example, I should say that any one who attempted to promote feelings of enmity between members of the Appellate Side Bar and members of the Original Side Bar could not be said to be infringing section 153-A, because I should say that the two sides of the Bar in a particular Court could not be designated as "classes" of His Majesty's subjects; they are mere groups". Wassoodew, J., in his judgment elaborated the position and suggested yet another element as a pre-requisite for a group being reckoned as a "class". The learned Judge remarked: "In my opinion, the expression "classes of His Majesty's subjects" in section 153-A of the Code is used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within the section carries with it the idea of numerical strength so large as could be grouped within a single, homogeneous community. . . . . It is true that in the development of citizenship a sharp distinction has arisen between one group of citizens and another based on purely materialistic or economic conceptions. For instance, the functional group, according to the economic theory, would be capable of being sub-divided into numerous smaller groups, each being described as a class in itself. The functional group might include the priestly class, the workers and the artisan class. Society could also be grouped according to the economic theory into the propertied class, the capitalistic class, like the sowcars, and the rentier class which live on the income of the property and the labour class. That was not, in my opinion, what was contemplated by the framers of section 153-A of the Code. None of these groups can claim both exclusive and common characteristics which could be readily ascertained, and, which, I think, constitute the essential quality of the class mentioned in section 153-A, Indian Penal Code". The antithesis between Dives and Lazarus, between "haves" and "have-nots" is as old as the world and there is every justification for the statement that the word 'classes' must be understood not with reference to economic or materialistic distinctions, but with reference to racial, cultural, religious, linguistic and such like distinctions only.

ABDUL RAHMAN v. VILAYAT HUSSAIN, (1943) I.L.R. 22 Pat. 74.

This case has laid down that an insolvency court has inherent power like other civil courts to correct its own mistakes and to pass appropriate orders. In the case under notice, the question arose with reference to the setting aside of an order passed *ex parte* in favour of the surety of an insolvent who had been compelled to pay the creditor of the insolvent, permitting him to sue the insolvent for recovery of the amount. In England, section 108 (1) of the Bankruptcy Act of 1914 (corresponding to section 104 of the Bankruptcy Act of 1883) enacts that every court having jurisdiction in bankruptcy under that Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. Even before any statutory provision was made in this respect, the English Bankruptcy Courts were exercising the power of review as an *inherent power*, see *Ex parte Roppey*,[1] *Ex parte Atherton*[2]. In India, section 8 (1) of the Presidency Towns Insolvency Act enacts: "The Court may review, rescind or vary any order made by it under its insolvency jurisdiction". As regards however the Provincial Insolvency Act of 1907 and the later Act of 1920 the legislature did not confer any such power by express enactment. The question therefore fell to be considered whether such power

1. (1815) 19 Ves. 468: 34 E.R. 590. 2. (1868) L.R. 3 Ch. App. 142.

existed as an inherent power or may be inferred from the general powers contained in section 5 which stated: "Subject to the provisions of this Act the Court in regard to the proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original jurisdiction". The result has been, in the words of a learned author, "a labyrinth of case-law on the interpretation of this section with reference to the power of review of insolvency courts". An argument against the existence of the power in the case of the mofussil Courts founded upon the difference in the provisions of the Presidency and the Provincial Acts was met in *Ayyasami Chetti* v. *Official Receiver*[1] thus: "The Civil Procedure Code, as such, does not apply to the proceedings before the original side of the High Court, whereas the Civil Procedure Code as such is made applicable under section 5 of the Provincial Insolvency Act to proceedings before the mofussil courts. That probably is the reason why we have not got any such specific provision in the Provincial Insolvency Act corresponding to section 8 (1) that occurs in the Presidency Towns Insolvency Act". On the question whether section 5 will enable the insolvency court to "review, rescind or vary its orders", in *Venugopalachariar* v. *Chunni Lal Sowcar*,[2] it was held that no such power would be available at any rate wherever there was an express remedy provided in the Act in regard to any matter, stress being laid on the opening words of the section "subject to the provisions of this Act". An earlier decision of that Court had however taken a broader view in *Abbi Reddi* v. *Venkata Reddi*,[3] where it was stated: "The Court exercising ordinary original jurisdiction has power to review its orders. There is no warrant for the proposition that a civil court cannot correct its own orders or cannot modify any order which it has passed when it finds that the order is patently wrong . . . . . . When an insolvency court has the same powers and follows the same procedure as a civil court exercising ordinary original civil jurisdiction, it cannot reasonably be contended that the power to review has been taken away. Under the English Bankruptcy Act the power to review is specifically given. Such provision is not specifically enacted in the Provincial Insolvency Act as the insolvency court is invested with jurisdiction which an ordinary civil court has in the exercise of its original jurisdiction". See also *Official Receiver* v. *Nataraja Sastrigal*[4], *Govinda Rao* v. *Official Receiver, Trichinopoly*[5], *Ayyasami Chetty v. Official Receiver, Coimbatore*[1]. In *Mannu Lal* v. *Kunj Behari Lal*[6], the Allahabad High Court has taken a similar view and in *Balla Mal* v. *Mussamat Fatima Bibi*[7], Tek Chand, J., observed: "I have . . . . . no doubt that the legislature has recognised the existence of inherent powers in insolvency courts to pass appropriate orders in the same manner and to the same extent as civil courts" The Lahore decision recognises the powers as an inherent power of the Court itself and in Calcutta also that view has found favour. Thus in *Sarat Kumar Ray* v. *Nabin Chandra Ram Chandra Shaha*[8], Rankin, C.J., remarked "Where an *ex parte* order is passed in insolvency proceedings the person affected may bring the matter to the notice of the Court and it is always open to it to undo the order on the ground that the original order was made on insufficient materials or that for other reasons it should not have been made". The conclusion in the case under notice that the insolvency court has power to set aside an *ex parte* order passed by it earlier on the ground of mistake is thus in accord with the general consensus of judicial opinion, though there might be some difference as to the proper basis of the power, whether it is inherent in the Court itself to enable it to do justice or whether it flows out of section 5 of the Provincial Insolvency Act.

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1. (1931) 61 M.L.J. 719.
2. (1926) 51 M.L.J. 209: I.L.R. 49 Mad. 935.
3. (1926) 51 M.L.J. 60.
4. (1923) 44 M.L.J. 251: I.L.R. 46 Mad. 405.
5. A.I.R. 1927 Mad. 897.
6. (1922) I.L.R. 44 All. 605.
7. (1934) I.L.R. 15 Lah. 698.
8. (1928) I.L.R. 56 Cal. 667 (F.B.).

SRIMATI MANI DEVI *v.* SRIMATI ANPURNA DAI SIJUARIN, (1943) I.L.R. 22 Pat. 114.

This case decides *inter alia* that an assignment of a surety bond by an order of Court need not be made by an instrument in writing and that the provisions of section 130 of the Transfer of Property Act do not apply to such a transfer. A claim under a surety bond is no doubt an actionable claim and under section 130 the transfer of an actionable claim can be made only by an instrument in writing. Section 2 (*d*) however in terms provides that the provisions of the Transfer of Property Act shall not apply to any transfer made in execution of a decree or order of a Court of competent jurisdiction. The only question that may then arise is whether section 2 (*d*) stands controlled or controls section 130. The very wording of the former provision indicates that its operation is paramount unless expressly otherwise stated. Thus while it is stated that section 2 (*d*) cannot affect anything in chapter IV, there is no similar reservation made in regard to section 130 which occurs in chapter VIII. In *Palaniappa Tevan* v. *Shadagopa*,[1] it was held that section 135 cannot apply to execution sales by reason of section 2 (*d*). *Ram Saran Das* v. *Yudhishatar Prasad*,[2] is a direct authority in regard to the scope of section 130. There it was held that where a Court had obtained a security bond hypothecating immovable property to secure a proper disposal of the money due to minors deposited with it, an assignment of the security bond in favour of the minors on their attaining majority to enable them to realise the money from the surety can be made merely by an order of the Court without any registered deed of transfer. The conclusion in the instant case is thus in accord both with statute and authority.

RAI SAHEB DR. R. P. GHOSH *v.* THE BENGAL AND NORTH WESTERN RAILWAY COMPANY, LTD., (1943) I.L.R. 22 Pat. 154.

The nature and extent of the duty owed by a railway company towards persons resorting to its stations and yards in the ordinary course of business in regard to the maintenance and upkeep of the premises and yards is a matter of more than passing interest from the point of view of the general public. In the above case it is pointed out that the duty of the railway company in this matter is similar to that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business and that the position is in no way analogous to or comparable with, for instance, that of a local body in respect of highways. In England, at common law, the duty to repair the highways and keep them in a proper condition ordinarily rested with the parish and in case of breach thereof the only remedy was an indictment of the inhabitants and no action for damages lay either against the inhabitants or against their surveyor. The immunity which attached to the surveyor at common law now attaches to the local authorities to whom the duties of the surveyor are transferred by statute. In *Gibson* v. *Mayor of Preston*[3], it was held that in respect of personal injuries sustained by a member of the public due to non-repair of a highway, no action for damages can be brought against the local board of health constituted under the Public Health Act. In India also it is well-settled that a highway authority will not be liable in damages in respect of a mere non-feasance, *Rahim Baksh* v. *Municipal Board of Bulandshal*.[4] In regard to the duty owed by an occupier of premises, the leading authority is the decision in *Indermaur* v. *Dames*[5], where the occupier of premises was held liable in damages in respect of injuries sustained by a person who was on the premises on lawful business, consequent on his falling down through a hole in the floor, there being no proper warning to apprise any in-

1. (1911) Mad. W.N. 133.
2. (1931) I.L.R. 53 All. 786 (F.B.).
3. (1870) 5 Q.B. 218.
4. A.I.R. 1939 All. 213.
5. (1866) 1 Com. P. C. 274.

vitee of the existence of the danger. *Norman* v. *Great Western Railway Company,*[1] holds that doctrine of *Indermaur* v. *Dames*[2], is applicable to railway companies and that the duty of the company towards persons resorting to its stations and yards is analogous to that of the occupier of premises towards persons who went there on lawful business. In other words the duty of the railway in such a case is the duty to take reasonable care that its premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. Thus the railway company will be liable not merely in case of misfeasance but also in respect of non-feasance amounting to negligence on its part. In the case under notice, the railway company had allowed a depression to remain in the railway platform into which a passenger in his anxiety to board the train slipped and sustained injuries. The decision is also noteworthy for its enunciation that mere anxiety on the part of a passenger to catch a train could not without more amount to contributory negligence or carelessness on his part.

RADIANT CHEMICAL COMPANY, LIMITED, *In re*:, (1943) I.L.R. 22 Pat. 204.

A point of some nicety and one on which there is little by way of authority was decided in this case, which held that a public company can be converted into a private company by suitable alterations in the articles of association and that it is not the law that such conversion cannot be effected except by winding up the public company and re-constituting it as a private company. It is of the essence of a private company that by its articles it prohibits any invitation to the public to subscribe for its shares, if any, or the debentures of the company [section 2 (1) (13), Companies Act]. In the case of a public company there is no such prohibition and hence the public are interested. So when a private company is converted into a public company by amendment of its articles of association, certain information has to be sent to the Registrar of Joint Stock Companies, default in regard to which would be punishable. The information has to be lodged because the public are interested in the matter and their interests have to be safe-guarded. Section 154 of the Companies Act deals with the conversion of a private company into a public company and proceeds on the assumption that the conversion can be effected by appropriate alterations in the articles of association. There is however nothing in the section to suggest that a public company cannot be converted into a private company in a similar way. There was no need for a specific provision to deal with such conversion because there is no question of the public having any interest in the conversion or of the registrar requiring any information. In other words the *raison de'etre* behind the necessity to lodge the information in the case of a public company is absent in the case of a private company. In England it seems to be well-settled law that a public-company can be converted into a private company by suitable alterations in its articles[3]. The instant decision follows the English rule and incidentally draws attention to the fact that the amendments to the aricles of association in such a case do not require the confirmation of the High Court and that under section 82 of the Companies Act the Registrar will be bound to file them.

JAINARAIN SAH v. KING EMPEROR, (1943) I.L.R. 22 Pat. 600.

This case contains a valuable pronouncement on the principles that should underlie the passing of sentences in criminal cases. Theories of punishment have been numerous and shifting. In any event, deterrence is not its only aim. It is true that standards of punishment may not be uniform. Even so, there are certain considerations to guide a tribunal in awarding punish-

1. (1915) 1 K.B. 584.
2. (1866) 1 Com. P. C. 274.
3. Halsbury's Laws of England, 2nd Edition, Vol. 5, p. 133.

ments. In the present case the accused had been convicted under rule 38 (*a*) of the Defence of India Rules and was originally sentenced to rigorous imprisonment for five years, which on appeal was reduced to three years and finally by the High Court in revision to the period already undergone. The conviction was in the words of Shearer, J., "in respect of a casual remark purporting to repeat some quite ridiculous and fantastic claim made in a Japanese broadcast", consisting of "less than twenty words", made "in the presence of less than a dozen persons", not one of whom seemed to have "attached any significance to it at all". In reducing the sentence, Varma, J., observed: "Courts, while awarding sentence, should be cautious in making the sentence proportionate to the nature of the offence committed and should not award a sentence which may seem to be of a vindictive nature. An unnecessarily severe sentence is apt to defeat the object for which it is passed. . . . . . The sections prescribing sentences give the limit to which a sentence can be passed but that does not mean that the maximum sentence should be awarded in each case. The extent of sentence has to be judged upon the circumstances of each case." Shearer, J., added: "having regard to what the petitioner actually did, the sentence was utterly disproportionate and was, in my judgment not unlikely to do harm by creating the impression that there must be something in the claim made by the Japanese if the authorities thought it necessary to punish the mere casual repetition of it so severely". It is to be hoped that the admonition will always be borne in mind by the subordinate courts in awarding sentences.

JAGADISH CHANDRA DEO DHABAL DEB *v.* GAYA PRASAD SINGH, (1943) I.L.R. 22 Pat. 648.

This decision deals with a point concerning the relationship of landlord and tenant. It holds that a suit to eject a ryot from a portion of the tenancy on the ground that he has misused it is not maintainable. The point arose under section 22 of the Chota Nagpur Tenancy Act, 1908, but is of wider interest in view of analogous statutory provisions in the Tenancy Acts of other provinces. The misuse found was the diversion of a portion of an agricultural holding for building purposes and the erection of houses on such portion. Section 22 provides for ejectment where the tenant has misused the holding in the manner contemplated by section 21. In passing, it may be noted that section 68 provides generally that no tenant shall be ejected from his tenancy *or any portion thereof*. In the Bengal Tenancy Act, section 25 provides that a ryot cannot be ejected from his holding except (among other things) on the ground "that he has used the land comprised in the holding in a manner which renders it unfit for the purposes of the tenancy". Likewise section 151 of the Madras Estates Land Act provides that a landholder may sue for the ejectment of a ryot from his holding only on the ground that he has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. Similar provisions are to be found in sections 52 to 69 of the Central Provinces Tenancy Act, sections 61-65 of the North-West Province Tenancy Act and sections 39 to 48 of the Punjab Tenancy Act. In the first place, does the mention in section 68 of the Chota Nagpur Tenancy Act of the tenant not being liable to be ejected from his tenancy or any portion thereof mean that though there is no misuse of the holding generally, if however, there is misuse in regard to portions of it, he can be ejected from such portions or does it mean that where there is no misuse of the holding generally there can be no ejectment of the tenant at all, not even with reference to any portion of it? Are the mention in section 68 of the Act of the tenant not being liable to be ejected ordinarily from any portion of the tenancy even and the non-mention of anything like that in the other Acts a mere accident having no significance? The Chota Nagpur Tenancy

Act like the other Tenancy Acts provides for the sale or purchase of a part of the holding or tenure but nowhere does it provide for ejectment of a tenant from a part. The view was therefore taken, following the decision in *Trustees, Chokkanathaswami Temple* v. *Vadivalmuruga Nadar*,[1] that the reference to a part of the holding in section 68 of the Chota Nagpur Tenancy Act may well be merely to emphasise a preservation against ejectment save as provided in the Act. Again it is difficult to appreciate how it will be open to a landlord to split up his tenant's tenure by declaring that he has no right to a portion of the land comprised therein because a misuse had been committed, but at the same time he has right to remain in possession of the remainder, see *Ram Kanie Mandal* v. *Gunesh Chunder Sen*.[2] The principle laid down in *Kamaleswari Prasad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur*,[3] that no suit to eject a tenant from a portion of his tenancy only will be competent is really a general principle of law governing the relationship of landlord and tenant.

Decisions have repeatedly held that misuse to justify ejectment must affect the holding or tenure as a whole. No doubt this will be a question of fact depending upon the circumstances of individual cases, the size of the holding, the extent of land withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding taken as a whole for a profitable cultivation, *Hari Mohan Misser* v. *Surendra Narayan Singh*[4]. If the holding as a whole is affected it is immaterial whether the alleged acts of impairment were actually done over the entire holding or only on parts of it, *Rama Chetty* v. *Arunachalam Chettiar*[5]. On the special facts of the respective cases, applying the aforementioned tests, the excavation of a tank on two bighas in an agricultural holding of 66 bighas was held to be no impairment of the holding as a whole, *Sowrindra Mohan* v. *Rahim Baksh*,[6] likewise the use of 1|20th of a holding to erect buildings for housing cattle and storing manure was held insufficient in *Zamindar of Seithur* v. *Dorai Venkataraju*[7] to support a case for ejectment. In *Rama Chetty's case*[5], it was held that the use of 1|48 of the holding which was an agricultural one, as building site will not justify a claim to eject. On the other hand in *Srish Chandra Ganguly* v. *Esum Musalli*[8], the erection of a mosque on a holding was held to impair the holding as a whole for agricultural purposes and ejectment was allowed. Similarly in *Zemindar of Muktyala Estate* v. *Kameswara Somayajulu*[9], the diversion of 14 acres out of 15 acres and 65 cents of an agricultural holding to be used as building sites—though a building had been erected actually only on a plot of about 100 square yards—was held to afford cause for ejectment. So also in *Narayan Rao* v. *Zemindar of Muktyala Estate*[10], the use of two cents of land for building but with a compound 1 acre in extent out of an agricultural holding comprising 2 1|3 acres was held to justify the passing of an order of ejectment.

SATYANARAYANA *v.* KING EMPEROR, (1943) I.L.R. 22 Pat. 681.

"This case is to my mind apt to nip any budding affection which one might have had for the Code of Criminal Procedure". Thus observed Brough, J., in the above case where one of the chief contentions was that no inference can be drawn adversely to the accused from the statements made by them in the course of a departmental enquiry because they were not *specifically put to them in their examination under section* 342 *of the Criminal Procedure Code*, they hav-

1. (1936) 161 I.C. 230: A.I.R. 1936 Mad. 220.
2. (1933) 33 Cal. L.J. 513.
3. (1905) 2 Cal. L.J. 369.
4. (1907) I.L.R. 34 Cal. 718: L.R. 34 I.A. 133: 17 M.L.J. 361 (P.C.).
5. (1915) 29 M.L.J. 724: I.L.R. 39 Mad. 673.
6. (1911) 15 I.C. 497.
7. (1939) 1 M.L.J. 433.
8. (1934) I.L.R. 61 Cal. 75.
9. (1926) 50 M.L.J. 97.
10. (1928) 54 M.L.J. 621: I.L.R. 51 Mad. 478.

ing stated that they would file and in fact did file a written statement. The point is one of considerable importance affecting the general adminisration of justice and according to Brough, J., illustrates the inconvenience of the rule existing in India that the accused cannot give evidence. The learned Judge forcefully remarked: "That rule has been abrogated in England for 45 years and I understand the general view is that the abrogation has been favourable to the administration of justice. The English practice leaves it to the accused to give evidence or not as he likes and if he elects to give evidence it is for his legal advisers to elicit such facts as they consider material; his explanations are liable to be tested by cross-examinations, but this is no disadvantage to the innocent accused. The position of the Court under section 342 is very invidious; if it fails to ask proper questions no inference may be drawn against a prisoner from his failure to give a satisfactory explanation which may result in the quashing of a conviction; if on the other hand, the Court presses the witnesses too hard it is charged with cross-examining the accused which is equally not permitted". No doubt there is much to be said in favour of the English practice but it will always be a debatable question whether the benefit which may accrue to the accused by giving testimony may not be out-weighed by the risk of being subjected to a searching cross-examination.

Where having heard all the evidence, the accused in answer to questions put to them in their examination under section 342, merely intimated that they would file a written statement and in fact filed one there cannot be any duty on the part of the Court to go on and ask specific questions, *Bhagwat Singh King Emperor.*[1] As observed by Bucknill, J., in *Saiyid Mohiuddin* v. *King Emperor*:[2] "Provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of section 342, that is, of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial wholly nugatory". As recognised by Brough, J., in the instant case, different considerations would arise if the accused were not legally represented or the Court thought for any reason that the accused or his legal adviser did not properly appreciate the case that had to be met.

RAJABALLAM SINGH *v.* KING EMPEROR, (1943) I.L.R. 22 Pat. 726.

A noteworthy point of practice is laid down in this case which points out that where the High Court directs the release of an accused on bail to the satisfaction of the District Magistrate, the latter cannot demand a cash deposit as a condition to the release of the accused. Chapter XXXIX of the Criminal Procedure Code only contemplates the execution of a bond with sureties and the form of the bond is prescribed in No. 42 of Schedule V. The intention of the law undoubtedly is that a man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security as may be required of him appropriate for the purpose of securing his appearance before a Court that he should remain in detention, see *Emperor* v. *Mir Hashmali*,[3] This principle will hold good not merely pending trial, but even where after conviction the Court has thought fit to release a person on bail pending any appeal or revision. Section 499, Criminal Procedure Code itself points out that the amount of every bond executed under Chapter XXXIX shall be fixed with due regard to the circumstances of the case and shall not be excessive. There is nothing in the section to justify the demand of a cash deposit.

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1. (1924) I.L.R. 4 Pat. 231.
2. (1925) I.L.R. 4 Pat. 488, 494.

1. (1917) 20 Bom.L.R. 121, 123.